LAW OF Evidence - SEM 7-1

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Jogesh Chandra Chaudhuri Law College
Students' Union

30, Prince Anwar Shah Road, Kolkata, 70003

Email: jcclcsu.kolkata@gmail.com Phone: 9831948661 / 9831464712

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7TH SEMESTER LAW OF EVIDENCE NOTES

INITIATED BY

NEIL BASU
(GENERAL SECRETARY)

ARRANGED BY

UTSA PODDER
(SECRETARY OF ACADEMIC AFFAIRS)

CIRCULATED BY	
SKMD WASIM AKRAM (CR) – SEC C	ANUVA PODDER (CR)- SEC B
SOUHARDYA BISWAS (CR) – SEC C	ARITRA ROY (UR) – SEC A
SAYANTAN KAR (CR) – SEC B	NIRUPAM DAS (UR)- SEC B
TAIFUR KHAN HENGA (CR) – SEC B	

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LAW OF EVIDENCE

Q. What do you mean by the term 'Evidence'? Is the definition of 'Evidence' in the Evidence Act complete?

Before dealing with "evidence law", it is important to discuss about the concept of "evidence" in general since evidence and law of evidence are two different things. The word "evidence" is originated from a Latin term "*evidentia*" which means to show clearly, to make clear to the sight to discover clearly certain, to ascertain or to prove. Thus, evidence is something, which serves to prove or disprove the existence or non-existence of an alleged fact. The party who alleges the existence of a certain fact has to prove its existence and the party, who denies it, has to disprove its existence or prove its non-existence.

However, all facts traditionally considered, as evidence may not be evidence in the eyes of evidence law. Rather, evidence is something presented before the court for the purpose of proving or disproving an issue under question. In other words, evidence is the means of satisfying the court of the truth or untruth of disputed fact between the parties in their pleadings.

The term "evidence" means and includes —

(i) Oral evidence - i.e., all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; and

(ii) Documentary evidence - i.e., all documents, including electronic records, produced for the inspection of the Court.

The above definition of the term "evidence" is not a complete definition. Evidence, thus defined, is not the only medium of proof; in addition to it, there are a number of other matters like the demeanour of a witness, which the Court has to take into consideration when forming its conclusion. The definition of 'evidence' has to be read with word "proved" (see below) when determining what is 'evidence' within the Act.

Bentham defines evidence as "any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce in the mind, a persuasion concerning the existence of some other matter of fact - a persuasion either affirmative or disaffirmative of its existence."

Taylor uses the word evidence to mean "all the legal means, exclusive of mere argument, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation".

The confession of an accused person is not evidence in the ordinary sense of the term, as defined in this section, though it has to be given due consideration in deciding a case.

Similarly, the confession of a co-accused has to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though a confession may be regarded as evidence in that generic sense, the fact remains that it is not evidence as defined by Section 3 of the Act. **(Haricharan Kurmi v. State of Bihar, AIR 1964 SC 1184)**

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What evidence means and includes is described in Section 3 of the Evidence Act, but affidavits are not included within that description. Rather, affidavits have been expressly excluded by Section 1 from the applicability of the Act. That means that affidavits cannot be used as evidence under any of the provisions of the Indian Evidence Act. (**Firm S. Rajkumar v. Bharat Oil Mills, AIR. 1964 Bom. 38**)

Judicial Evidence: The expression "judicial evidence" may be defined as evidence received by Courts in proof or disproof of facts, the existence of which comes into question before such Courts. It will thus be seen that judicial evidence is a species of the genus "evidence" and is mainly natural evidence as refined and modified by rules of positive law.

Q. Distinguish between "May Presume' and 'Shall presume". When the court may presume about the existence of certain facts?

May presume: *"Whenever it is provided by this Act that Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it."*

According to section 4 of the Indian Evidence Act, 1872 whenever the court may presume a fact, it may either regard the fact to be proved until it is disproved or may ask to prove it. It leaves upon the court to make or not to make presumption from the circumstances and facts of the case. Presumption means conclusive deduction. The court, based on its rational prudence may presume a fact or may not presume a fact or may call for further proof to corroborate it. Sections 86 to 90-A, 113-A, 114 and 114-A of the Evidence Act provide the necessary presumptions for "may presume".

A Presumption is a rule of law. The court shall draw an inference from a particular set of facts, or, from a particular evidence. 'May Presume' refers to natural presumptions. These are inferences drawn naturally and logically from the experience of mankind, usage and habits of society.

These are rebuttable.

Certified copies of foreign judicial records: The Court may presume them to be genuine and accurate if duly certified by the concerned authority. (Section 86)

Books/Maps and Charts: The court which may refer for information on matters of public or general interest, as relevant facts, may presume that these were written and published duly at the place, by the persons there of. **(Section 87)**

Telephonic Message: The court may presume that telegraphic message received by the addressee corresponds with the message given for transmission. However, the court will not make any presumption as to who has sent the message. (Section 88)

Ancient documents: In regard to such documents which are thirty years old, and produced from proper Custody, the court may presume that the signature, the hand-writing, are proper ; and, that the attestations and execution are duly done.

Shall presume: *"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it disproved"*

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The word shall denote a strong confirmation and intention. Whenever the court has to presume a fact under this section, then the court shall regard such fact to be true unless it is disproved. It does not give any discretion to the court to presume or not to presume the fact. If the court is directed as per this section, the court has accepted it to be proved until it is disproved and the party interested to disprove it has to do so by providing evidence. If the opposite party can prove that the fact is not true then the court will not presume. This is also known as the presumption of law. The phrase 'shall presume' is to found in Sections 79, 80, 81, 83, 85, 89 and 105, 113B etc.

This is rebuttable and stands good until disproved

Certified Copies: Every Certified copy duly issued by the concerned authority shall be presumed to be genuine, and, duly certified by that authority and that authority held the official status stated therein. **Section 79**

Records of evidence in judicial proceedings: The Court shall presume, that such documents forming part of judicial proceedings, are genuine, that the statements contained therein were duly taken or recorded. (This refers to Confession Statements, or any document or memorandum before any judicial proceedings). **Section 80**

Gazette, Newspaper, Acts of Parliament (Or Legislature) and other documents, shall be presumed to be genuine. **Section 81**

Court may presume about the existence of certain facts

Section 113B of Evidence Act "Presumption as to dowry death": When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Section 113-B raises a presumption of guilt against any person who has been proved to have subjected the deceased woman, soon before her death, to cruelty or harassment, in connection with dowry. Needless to state, it is a presumption intended to be raised against the husband and his relatives in the case of dowry deaths, which have become increasingly common in India.

It has been held that the wife's death caused by suicidal hanging is also covered by Section 113-A. **(Public Prosecutor, A.P. v. T. Basava, 1989 Cri, L.J. 2330)**

In a case decided by the Supreme Court, the bride's in-laws did not allow her to go to her parents' house, and when her father and brother came to meet her, they were driven away, complaining that a scooter and a T.V. had not been given in dowry. When the bride suffered an unnatural death within seven years of marriage, the presumption under Section 113-B was allowed to be invoked, and one of the in-laws was convicted for the dowry death. **(Shanti v. State of Haryana, A.I.R. S.C. 1126)**

In another case, a newly wedded wife was subjected to severe beating by her in-laws right from the date of marriage, until she died with 100 per cent burn injuries. It was held that the presumption under this section could be invoked to sentence the accused. **(State of M.P. v. Sk. Lallu, 1990 Cri. L.J. 129)**

In another case, the wife was shown to have died by poisoning by aluminium phosphide, within three years of marriage. However, there was no evidence that, soon before her death, she was subjected to any cruelty or harassment by the husband or any of his relatives for any demand for dowry. In the circumstances, the Court refused to invoke the presumption under Section 113-B of the Act. **(Jagbir Singh v. State of Punjab, (1992) 2 Crimes 746)**

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It should also be noted that the presumption under SECTION 113-B is not a conclusive presumption. In view of S. 4

of the Act, it is a rebuttable presumption. So, once the presumption is invoked, the burden shifts to the accused to demonstrate his innocence.

Section 114 of Evidence Act "Court may presume existence of certain acts": The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations: The Court may presume -

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can accounts for his possession.

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration.

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;

(g) That evidence which could be and is not produced would, if produced, be unfavorable to the person withholds it.

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given would be unfavorable to him.

(i) That when a document creating and obligation is in the hands of the obligor, the obligation has been discharged. But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:-

Presumption as to absence of consent in certain prosecutions for rape (Section 114A): In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) or section 376 of the Indian Penal Code, (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.]

A conjoint reading of the provisions makes the intention of the state very clearly as to the purpose of the Law makers that they want to help the helpless woman from the physical assaults of the men .

First of all , if the rapes are proved by established methods, can there be any single voice in support of the offenders? Where is the question of the rules being anti-mail? Should there be any sexual intercourse lest rape happen at all.

The difference between consensual sexual intercourse and a forceful sexual assault (rape) can well be understood by experts .

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In **State of Maharashtra vs Madhukar N Mardikar [(1991) 1 SCC 57],** Supreme Court found fault with the police officer who raped a women, who was a prostitute, in his custody. Supreme Court said, 'merely because a woman is of easy virtue, her evidence cannot be thrown overboard. The accused being a police officer should abide the law and should protect the helpless. Here, the accused violated the duties entrusted to him.'

Q. Explain the term "Conclusive proof".

"When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

Whenever it is mentioned that a fact is a conclusive proof of another fact, the court has no discretion at all. It cannot call upon a party to prove the fact nor can it allow the opposite party to adduce evidence to disprove the fact. Conclusive proof in Section 4 of the Indian Evidence Act shows that by declaring certain fact to be conclusive proof of another and the artificial probative effect is given by the law to certain parts and no evidence is allowed to be produced with a view to combating that effect. ***(Din Dayal v. state, AIR 1959 All 420)***

For example, A files a suit in a court of law for the declaration that B is his legally married wife. The court gives a decree in favour of A and declares that B is his wife. After few years in the lifetime of A, B files a Suit against D for the property of one C, alleging that she is a widow of C. In this case, there will be an issue whether B is the wife of C. D files the copy of the judgment of the previous case. This judgment will prove that B is legally married wife of A. Now that B is legally married wife of A is a conclusive proof of the fact that she is not the wife of C, therefore after the judgment mentioned above have been filed, court cannot allow B to adduce evidence to prove that she is wife of C and not of A.

i) Judgment in rem is conclusive in respect of the legal character it declares.

ii) Section. 112: The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after divorce (the mother remaining unmarried) shall be conclusive proof that the son is legitimate. The burden is on the husband to show that he had no access to his wife at all and very strong proof is required by courts to establish this.

Eg. Husband living abroad for over one year. Here,H had no access to his wife, when the child would have been begotten. iii) Section. 113: Cession of territory by Govt.: The official gazette notification is conclusive proof.

Q. Define- Proved, Disproved and not proved.

Proved: *"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."*

It means such evidence as would induce a reasonable man to come to conclusion. ***(State of West Bengal v. Orilal Jaiswal, AIR 1994 SC 1418)*** A fact is considered to be a proved fact when after considering all the matter and the evidence, the court believes the statement to exist so much so that a prudent man under normal circumstances will believe that the statement exists. In the case of ***M. Narsingha Rao v. State of Andhra Pradesh (AIR 2001 SC 318)***

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the Supreme Court held that a fact is said to be proved when after considering the matter before it the court believes it to be true. The standard of proof required is proving beyond reasonable doubt, yet it need not be absolute.

Disproved: *"A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."*

A fact is said to be disproved when after considering all the matter and the evidence, the court does not believe the statement to exist or highly doubts its existence so much so that a prudent man under normal circumstances will not believe it to be true. For proving a fact, the burden is always on the person who alleges that the fact is not true.

Not Proved: *"A fact is said not to be proved when it is neither proved nor disproved."*

The expression not proved indicates a state of mind in between proved and disproved; when one cannot say whether a fact has been proved or disproved. It is a situation where. Merely because a fact has not been proved does not mean that it is false. Its falseness can be established only when it is disproved. A fact which is not proved may be true or may be false. A doubt lingers upon its truthfulness.

No	Proved	Disproved	Not Proved
1	The term 'proved' is positive	The term 'disproved' is negative.	The term 'Not Proved' is a mean between the terms proved and disproved
2	When fact is proved the court gives judgment in favour of the person, who has proved it.	When a fact is disproved no further question arises as to its proof.	When a fact is not proved, it implies further evidence either to prove or disprove the fact.

Explain :

(a) Burden of proof and Onus of proof.

The Court can decide a case only by considering the truth and value of the several facts alleged and proved by the parties as the facts are unknown to the Court. They must be established by evidence by the parties. Now the question that arises is which party must adduce evidence? The responsibility for adducing such evidence as will establish any fact and prove the case is called the Burden of Proof. So in simple terms, the responsibility to prove a thing is called burden of proof.

Section 101 of the Indian Evidence Act, 1872 defines **burden of proof** as, "*whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

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When a person is *required* to prove the existence or truthfulness of a fact, he is said to have the burden of proving that fact. In a case, many facts are alleged by the parties and they need to be proved by the party alleging the fact before the court so that the court can base its judgment on such facts. The burden of proof is the obligation on a party to establish such facts in issue or relevant facts in a case to the required degree of certainty in order to prove its case. In general, every party has to prove a fact that goes in his favor or against his opponent; this obligation is nothing but burden of proof.

Now the question that arises is that who has the onus of proof

Section 101 of the Indian Evidence Act, 1872 deals with "*On whom burden of proof lies - The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side*."

Burden of Proof and Onus of Proof

There is difference between burden of proof and onus of proof. The 'Burden of Proof' is the burden to prove the main contention of party requesting the action of the court, while the 'Onus of Proof' is the burden to produce actual evidence. The Burden of Proof is constant and is always upon the claimant but the Onus of Proof shifts to the other party as and when one party successfully produces evidence supporting its case.

The aspects of burden of proof and onus of proof were considered by the Supreme Court in the case of **A. Raghavamma & anr. vs. A. Chenchamma & anr., AIR 1964 SC 136 .** The Court had to consider a case of a party claiming to have been adopted and his right under a partition of the joint family in which he claimed right upon partition. Extensive evidence was led by both the parties. It was observed in paragraph 12 thus: There is an essential distinction between burden of proof and onus of proof : burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidents of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.

The contradistinction between burden and onus of proof was further considered in the case of **Anil Rishi vs. Gurbaksh Singh, AIR 2006 SC 1971**. In that case the Plaintiff claimed that the sale deed purportedly entered into by him with the Defendant was forged and fabricated. It was for the Plaintiff to prove that fact. An issue casting the burden on him was framed. It was then reframed putting the burden on the Defendant to prove that it was genuine. Repelling the reasoning of the Courts below that the Plaintiff cannot prove the negative and that it would be difficult for him to prove that fact and the Defendant would be better able to prove the document since he propounded it and had it in his possession, and considering Sections 101 and 102 of the Evidence Act, it was observed in paragraph 19 of this judgment that :

A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin.

The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

The extent of importance that has to be put on the onus of proof that is on a party consequent upon the burden that lies on such party to prove its claim came to be considered by the Supreme Court in the case of **State of Madhya Pradesh vs. Bhopal Sugar Industries Ltd., AIR 1964 SC 1179**. That was a case in which a tax was levied only upon

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persons carrying on agricultural operation in Bhopal region. It was challenged as discriminatory. The Petitioner alleged differential treatment as a similar tax was not levied upon similar agricultural operations outside Bhopal region. It was observed that the legislation can be challenged as arbitrary only if the unequal laws cannot be justified on geographical grounds imputing unequal treatment upon the applicant making out not only that he had been treated differently from others, but that he had been so treated from persons similarly circumstanced without any reasonable basis and unjustifiably. The Court also observed that the Petitioner was singularly deficient in furnishing particulars justifying the infringement. Similarly the State argued only a demurrer and did not place before the Court the evidence which would, in the very nature of things, be in its possession (upon the law in Section 106 of the Evidence Act). It was under these circumstances, observed that the Court would not be justified in dismissing the Petition on a technical view of the burden of proof. Parties were given an opportunity to lead requisite evidence which has a bearing on the issue.

(b) Examination in Chief, Cross Examination and Re-examination.

Chapter X deals with the examination of evidence. Further the chapter also deals with how the evidence is presented and witnesses lay their testimony in the court as well as the powers of the judges in such matters.

Section 135 talks about **Order of production and examination of witnesses.** It reads that the order in which witness are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

The order in which the witnesses are to be presented for examination is to be decided by the party leading the evidence and the court is very slow in interfering with the order. However, the court has the discretion to do so as long as it is fairly exercised.

Section 136 says that it is up to the **Judge to decide as to admissibility of evidence.** The Section reads as follows.

When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations: X is accused of receiving stolen property knowing it to have been stolen. It is to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

It is proposed to prove a fact (X) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (T, U and V) which must be shown to exist before the fact (X) can be regarded as the cause or

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effect of the fact in issue. The Court may either permit X to be proved before T, U or V is proved, or may require proof of T, U and V before permitting proof of X.

Keeping Section 5 of the Act, a Judge may ask the party proposing to give evidence of any fact in what manner the alleged fact will be relevent if proved. A party seeking to put a document in evidence must show the section or provisions under which the document is admissible.

Section 137 says that **examination in-chief** is the examination of a witness by the party who calls him and the examination of a witness by the adverse party shall be called his **cross-examination**. The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his **re-examination**.

Examination in Chief is the first examination after the witness has been sworn or affirmed. It is the prerogative of the party by who the witness has been called to examine him in chief so as to get all the material facts within his knowledge to prove such a party's case.

Cross- Examination is a powerful tool to test the veracity of a witness and the accuracy or completeness of what he has stated. Cross- examination can at times take form of intensive questioning with the expected answers hinted to in such questions itself.

The examination and cross – examination has to be related to relevant facts but the cross –examination need not be confined to the facts to which the witness testified on his examination –in-Chief.

The **re-examination** shall be directed to the explanation of matters referred to in cross-examination ; and , if new matter is, by permission of the Court, introduced in-re-examination, the adverse party may further cross-examine upon that matter.

In civil cases, the advocate or counsel narrates the facts of the case and this is known as the opening of the peading. In criminal cases, one of the officers of the ourt reads out the summary of charge levelled against the accused as well as his plea.

Now **three basic stages** can be laid down in the examination of witnesses:

1. **EXAMINATION IN CHIEF:** Where the advocate for the party calling the witness introduces the witness and examines him, whether for the plaintiff or the defendant. It is a vivavoce examination. Here the questions are to the witness and he answers them and the answers are dult recorded. No leading questions ahould be posed here. It is preferable that the questions move in a chronological order so that the information presented can be lonked to the case better. Only relevant questions can be asked. Here the questions are asked for the sake of an answer,generally one that supports and proves the case for the party who called the witness.

2. **CROSS EXAMINATION:** The cross-examination is also called examination exadverso. It can be used to impeach the credibility of the witness as well as expose the inaccuracies of the evidence of the particular witness.

If the defense fails to challenge the relevant facts that have been stated by the prosecution witness in the examination-in-chief, the court may take it as acceptance of the truth of such facts as was decided in ***Ganesh Jadhav V State Of Assam 1995 1 Cr LJ 111.***

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3. **RE-EXAMINATION:** If the counsel thinks it is necessary, he may with the permission of the court reexamine hiw own witness. RE-examination cannot be claimed as a matter of right and its purpose is only to explain the new points or matter that may have been raised in the cross-examination and not to prove any other fact.

An order of re-examintaion can be made by the court on an application by a party or by court's own motion. If the prosecution does not examine its witness and offers him to be cross-examined, it is tantamount to abandoning one's own witness anf therefore, a witness cannot be thrwon open to cross examination unless he is first examined-in-chief.

Each question should call for a fact and not for opinions or conclusions on law.

Section 138 lays down the **order of examinations of witnesses** or turns in simple terms. It says that witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross –examined, then (if the party calling him so desires) re-examined.

Now sometimes a person is **called to the court to produce a document. Section 139** says that such a person does not become a witness by the mere fact that he produces it and cannot be cross examined unless and until he is called as a witness. This principle was reteriated in ***Bijoy Bharati V Fakrul Hussain 1976 3 SCC 642***.

Further **Section 140** says that witnesses to character may be cross-examined and re-examined.

This is an important basic concept of the law of evidence. We have to know about Leading questions. **Section 141** says that any question suggesting the answer which the person putting it wishes or expects to receive is called a **leading question.**

Illustration: The purpose of examination-in-chief is that the witness can tell the relevent facts in his own words and put them across himself. A leading question is where a person does not have this freedom. For instance, if a witness is asked, "Do you live at XYZ place, City M?", he will answer in a mere yes or no and thus, it is said that leading questions put the answer in the mouths of the witnesses.

A leading question can put in the examination-in-chief or the re-examination with the permission of the Court. They cannot asked if **objected** to by the adverse party, in an examination-in-chief, or in a re-examination, except with the permission of the Court as per **Section 142**. The Courts **permit leading questions** as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved. A leading question may be asked in cross examination as per **Section 143**.

Section 144 says that any witness may be asked, whilst under examination whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

In simple terms, a witness can give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration: The question is, whether X assaulted Y. M deposes that he heard X say to N-"Y wrote a letter accusing me of theft, and I will be revenged on him". This statement is relevant, as showing X's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

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Section 145 allows the **cross- examination of a witness with respect to previous statements made by him in writing or reduced into writing or** reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of its which are to be used for the purpose of contradicting him.

The general rle is that the contents of a writing cannot be used unless the writing is itsel produced. This section is an exception to this rule. The prpose is two-fold, one that the credit of the witness can be impeached as well as that the statement cannot be used as a positive evidence of the facts contained inwriting. This Section mandates that if any contradiction in the evidence of a witness in his previous statement is intended to be used, the attention of the witness must be called to that particular part of his previous statement and has to proved in an appropriate manner.

This Section applies only to contradictions. But if there are omissions in the previous statements that are not contradictions but throw some doubt on the veracity of what was omitted, the uncertainty may be capable of removal by questions in re-examination as was decided in ***LAXMAN V STATE 1974 3 SCC 704***.

Section 146 says that a **witness** during cross-examination, may**, in addition** to the questions herein before referred to, be asked any questions which tend:

1) to test his veracity.

2) to discover who he is and what is his position in life, or

3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly t expose him to a penalty or forfeiture.

Such questions can be asked even if the answer might tend to directly or indirectly incriminate the witness or expose him to a penalty or forfeiture.

(c) Admission and Confession.

As the definition of admission is also applicable to that of confession and confession comes under the topic of 'admission,' it can be inferred that admission is a broader term and it covers confessions.

INTRODUCTION

Admission, as defined under section 17 of The Indian Evidence Act, 1872:

"An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances hereinafter mentioned."

The definition states that evidence can either be oral, documentary or be contained in electronic form (inserted by Information Technology Act, 2000). Its relevancy is depended on whether if, it satisfies the conditions mentioned in sections 18 to 23 of The Indian Evidence Act, 1872. Surprisingly, in common parlance, 'confession' is used to refer to adverse statements made by a competent party but it comes under the purview of admission. Admission is a broader term and includes confessional statements. Confession is nowhere defined in the act but the conditions for its relevancy are given in sections 24 to 30.

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ADMISSIONS

As already defined above, admissions are statements that attach a liability, as inferred from the facts in issue or relevant facts, to the party who made such statements; the statement, denouncing any right, should be conclusive and clear, there should not be any doubt or ambiguity. This was held by the Supreme Court in **Chikham Koteswara Rao v C Subbarao (AIR 1981 SC 1542).** They are only prima facie proof and not conclusive proof.

Admissions can be either formal or informal. The former also called judicial admission is made during the proceedings**,** while the latter is made during the normal course of life. Judicial admissions are admissible under Section 58 of the act and are substantive. They are a waiver of proof, that is, no further proof is needed to prove them unless the court asks the same. The Supreme Court in **Nagindas Ramdas v Dalpatram Ichharam (1974 1 SCC 242)** explained the effect of it, stating that if admissions are true and clear, they are the best proof of the facts admitted. Through informal or casual admission, the act brings in every written or oral statement regarding the facts of the case (by the party), under admission.

A person's conduct may also be taken as an admission. In an Australian case, **Mayo v Mayo (1949 P 172),** a woman registered the birth of her child but did not enter the name of the father or his profession. The court said that either she did not know who the father was or she was admitting that the child is illegitimate. In either case, there is an admission of adultery and an admissible evidence of adultery.

Before any admission becomes relevant, it should meet certain conditions, which are explained further down below.

Section 18, 19 & 20: These sections lay down the list of persons whose admission will be relevant. Section 18 lays down the rules for parties to the suit and sections19 & 20 lay down rules regarding relevancy for third parties. They are:

1. **PARTIES TO THE SUIT:** All statements made by parties to the suit that makes an inference as to a relevant fact or fact in issue is relevant. In case of defendants, a defendant's admission does not bind his codefendants as, then, the plaintiff would defeat the case of all defendants through the mouth of one. In case of the plaintiff, since they all share some common interest, the admission of one plaintiff is bound on co-plaintiffs (**Kashmira Singh v State of MP AIR 1952 SC 159**).

2. **AGENTS OF PARTIES:** As the law of agency dictates, anything done by an agent, in the normal course of business, is deemed to have been done by the principal himself (*qui facit per alium, facit per se*). Hence, if an agent is impliedly or expressly been asked to make an adverse statement, the same shall be relevant. A lawyer does not come under this section.

3. **STATEMENTS IN REPRESENTATIVE CHARACTER:** A person who sues or is sued in a representative character. These refer to people such as trustees, administrators, executors, etc. Nothing said in their personal capacity is taken as admission but if said in the representative capacity, it counts as an admission.

4. **STATEMENT OF THIRD PARTIES:** These include:

- Persons having proprietary or pecuniary interest in subject matter, provided, their statements are in the character of their interest.

- A predecessor-in-title, that is, from whom the parties have derived their interest in the subject-matter of the suit. This is applicable only if the parties to the suit continue holding their title. The previous owner of the title to the property can make admissions regarding the property and not the parties or the new owner.

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Section 21: This section is regarding the proof of admissions. It states that, since an admission is an evidence against the party who has made it; it cannot be proved by the party but has to be proved against the party. It is better explained by Crompton J in **R v Petcherini (1855 7 Cox CC 70):** If a man makes a declaration accompanying an act it is evidence, but declarations made two or three days, or a week, previous to the transaction in question cannot be evidence, otherwise it would be easy for a man to lay grounds for escaping the consequences of this wrongful acts by making such declarations.

It can, though, be proved in favour of the party, if, the party who made the statement, originally, died. This comes under Section-32 of the Indian Evidence Act and the statement is proved by the representatives of the original party. When the statement relates to a bodily feeling or state of mind, the person making the admission can prove it, too. The state of mind in question should be proved with an appropriate conduct, since, a person in pain would act differently than a person faking it. Certain other relevant statements can also be proved by the party making it, such as, when the statement is itself a fact in issue or if it is a part of res gestae.

Section 22 & 22A: Section 22, along with section 65 and section 22A (inserted by the Information Technology Act, 2000) provides that oral admissions as to the content of documents or electronic records are irrelevant unless the question is about the document or record being forged or genuine.

Section 23: In civil cases, when a statement or an admission is made 'without prejudice,' it is not relevant. It means that both the parties have agreed to that admission and no evidence is to be provided regarding the same. This section is meant to reach a compromise between parties and avoid litigation. It protects every admission made where 'without prejudice' is expressly or impliedly stated and they cannot be disclosed in the court, except by the consent of both the parties to the suit. In **Paddock v Forrester (1842 3 Scott NR 715: 133 ER 1404)** a letter was written by one party 'without prejudice.' The reply to the letter was not so marked but it was held to be inadmissible by the court. Only those admissions which come under the purview of Section 126 are to be compulsorily disclosed by the lawyer.

CONFESSIONS

A confession is nowhere defined under the act and it occurs under the heading 'admission.' The definition of 'admission' under Section 17, hence, becomes applicable for Confessions. In terms of the act, a relevant statement made in a civil case is an admission and an admission made in a criminal case is a confession.

In **Palvinder Kaur v State of Punjab (1953 SCR 94)** the Supreme Court upheld the decision of the Privy council in **Pakala Narayan Swami v Emperor (AIR 1939 PC 47)** and cited two points: confession must either admit the guilt in terms or admit substantially all the facts and secondly, a mixed up statement, containing confessional statements which will lead to acquittal is no confession. The court cannot remove the exculpatory part out of a statement and deliver a decision on the basis of the inculpatory part of the statement.

A confession, like admission, can be judicial or extra-judicial. In **Sahoo v State of UP (AIR 1966 SC 40)**, the accused was talking to himself and made the confession of killing his own daughter which was overheard by the witness. This was held to be confession relevant in evidence.

Section 24: This section makes those confessions irrelevant which are:

- A result of inducement, threat or promise;
- Inducement, etc be made from a person in authority;

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- It should relate to a charge in question; and
- It should hold out some worldly benefit or advantage.

The law considers confessions, which are not made freely, as false. A government official is considered to be a person in authority as they are deemed to be capable of influencing the course of prosecution **(R v Middleton, 1974 QB 191 CA).** The benefit promised should be reasonable and make the accused believe that he would gain an advantage from it and an evil which the accused is threatened with should be of a temporal nature.

Confession to Police: Section 25 to 30 talks about confessions to police.

1. **SECTION 25:** It provides that no confession made to a police officer shall be provable or relevant. This is to protect the accused who might be tortured to extract out a false confession. If a person is confessing in front of someone else, it will not be irrelevant just because of the presence of a policeman around. This section only applies to confessional statements, orally or in FIR; other admissions can be taken as evidence to prove facts or facts in issue.

2. **SECTION 26:** This section is similar to the preceding one and states that no confession of a person, in police custody, is provable. It applies the same context that a false confession could be extracted out through fear or torture. It not only applies to confessions to a policeman but to any other person. Police custody does not only mean within the four walls of a police station, but it could also mean police control in a home, a car or a public place. The only exception to this rule is that if the confession is made by the person in presence of a Magistrate, it will be admissible.

3. **SECTION 27:** If a statement leads to a discovery of a fact related to the crime, it becomes admissible, even if it was extorted out of the accused. This acts as an exception to Section 26. To certify the genuineness of the recoveries, they should be made in presence of witnesses. In **Mohan Lal v Ajit Singh (AIR 1978 SC 1183),** the accused, on arrest, indicated where he had kept the stolen goods and the same were found within six days. The court held that his liability can be inferred from the statement and was held liable for murder and robbery. A statement made cannot be used against other co-accused, as was held in **Satish Chandra Seal v Emperor (AIR 1943 Cal 137).**

4. **SECTION 28:** If the inducement, threat or promise, as defined in section 24 is removed, a confession afterwards, becomes relevant. Here, the confession is free and voluntary.

5. **SECTION 29:** Unlike admissions, where a 'without prejudice' statement is inadmissible, a confession that is made by a promise of secrecy is admissible. The law is only concerned with the confession being free and voluntary, hence, even if deception or fraud is being employed or the person is inebriated or if he is made to answer questions, he was not supposed to, the confession made through all these methods is admissible. In **R v Maqsud Ali (1966 1 QB 688),** two accused were left alone in a room where they thought they were all alone but secret tape recorders had been implanted in the room. The confessions thus, recorded were held to be relevant.

6. **SECTION 30:** This section comes into play when more than one person is jointly accused of the same offence. Here, if one of the co-accused makes a confession regarding himself and some other such persons, the court will take that confession into account against the accused and his co-accused. In **Kashmira Singh v State of MP (AIR 1952 SC159),** a person named Gurbachan, along with 3 others was accused of the murder of a child. Through his confession, the prosecution was able to give shape to the story and he, with Kashmira Singh was

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held liable and sentenced to death. Kashmira was acquitted by the Supreme Court on an appeal as uncorroborated confession was not deemed enough to deprive a person of the right to life.

DIFFERENCE BETWEEN ADMISSION & CONFESSION

In the end, it shall be important to discuss some differences between admission and confession as they are not essentially the same. As the definition of admission is also applicable to that of confession and confession comes under the topic of 'admission,' it can be inferred that admission is a broader term and it covers confessions. Hence, all confessions are admissions but not all admissions are confessions.

Confessions, usually, refer to admissions made in a criminal case whereas an admission is a relevant statement made in a civil case. As was held in cases **Pakala Narayan Swami v Emperor** and**Palvinder Kaur v State of Punjab (cited above),** that a confession must go further and admit the guilt in terms or substantially the facts from which guilt follows, and not merely acknowledge a fact suggesting an inference as to a fact in issue or a relevant fact.

An admission can either be in favour or against the interest of the party making it (Section 21 & 32), whereas a confession is always against the interest of the party making it.

An admission can be made anywhere, even in police custody, or in front of a person in authority or whether it was a result of inducement, whereas the conditions for relevancy of confessions are different and would not be applicable in such cases.

A confession is binding on the co-accused, whereas this is not the case in admissions. An admission can be made by a third party, too but confession proceeds from a person who has committed the crime. Lastly, admission is not a conclusive proof but a confession is taken to be a satisfactory proof of guilt of the accused.

(d) Direct and Circumstantial evidence.

Every person who comes across the following words, replies by saying that Direct Evidence is something which is direct in nature and Circumstantial Evidence is something which is indirect in nature. But this is a layman's language definition and it\'s inappropriate to use such legal terms which has very in-depth significance.

As per Section 3 of The Indian Evidence Act, 1872 evidence means and includes both oral and written evidence. Oral evidence includes all the statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. Documentary evidence includes all documents including electronic records produces for the inspection of court.

The evidence is any matter of fact that a party to the lawsuit offers to prove or disprove on a particular issue in a particular case. It can be said as the system of rules and norms or an arrangement of principles and norms that is utilized to figure out which certainties might be conceded, and to what degree a judge or jury may think about those realities, as verification of a specific issue in a lawsuit.

There are many types of evidence such as-:

- Eyewitness
- Participants

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- Prior Statements by the defendants
- Documents
- Physical Evidence
- Scientific Evidence such as fingerprints, DNA etc.
- Apart from these, there are two basic forms of evidence, under which the abovementioned kinds of evidence are generally covered. They are-:

Direct Evidence, and Circumstantial Evidence(commonly called Indirect Evidence)

Now as we know what exactly is Evidence, let\'s move onto the title of the article i.e. What is Direct and Circumstantial Evidence, and the difference between the two.

What is Direct Evidence?

"Direct Evidence" is evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. It supports the truth of an assertion (in criminal law, an assertion of guilt or of innocence) directly, i.e., without the need for an intervening inference. It directly proves or disproves the fact.

So Direct Evidence is real, tangible, or clear evidence of a fact, happening, or thing that requires no thinking or consideration to prove its existence. It does not require any type of reasoning or inference to arrive at the conclusion.

Drawback of Direct Evidence

Though Direct evidence is considered to be superior to Circumstantial evidence, one of the main drawbacks of Direct evidence is relying on the evidence completely without any thinking or reasoning to prove its existence. For example in the case of an eyewitness, he/she may lie or may not be able to understand if the event occurs quickly or at the time of high stress to the eyewitness. Also, it can happen that the eyewitness may maliciously testify i.e., intentionally testifies wrongly(though he may get prosecuted for perjury i.e., lying under an oath, that can happen only when the judge or jury orders to counter examine the testification of the witness.

Here comes into the picture the concept of Circumstantial Evidence, which is explained below.

What is Circumstantial Evidence?

Circumstantial Evidence is the evidence that does not point directly to the fact. A reasoning must be made or an inference, that links circumstantial evidence to the desired fact the party is trying to prove.

For instance, in the example explained above, the second part of the said example notifies the circumstantial evidence in its proper sense. In that nobody has seen who did the murder. Now the court or the judge has to circumvent all the issues and frame and connect it to find the desired fact.

In this way, the jury or the judge uses reasoning and logic to grope to the conclusion, unlike in, direct evidence where the judge or the jury relies on the words of the witness. In this type, any evidence has to be evaluated by cross-checking, for the reliability of the source.

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Another example would make it crystal clear. Example: B was murdered at 5-pm, in his own house. C saw A coming from the house of B at 5-15pm, with blood shredded knife in his hand. D gave the evidence that A and B seriously quarreled on the day before the occurrence of murder. E, a police officer seized the blood shredded knife from the almirah in the house of A. F, an expert deposed that the blood of the deceased and blood shredded knife of A was one same. These chain of evidence are "circumstantial evidence".

Nowadays, circumstantial evidence is more often given more importance than direct evidence, because more often in criminal law, direct evidence is misused and justice gets impaired. For instance, fingerprints are circumstantial evidence.

Does direct evidence have more probative value than circumstantial evidence?

The most common form of direct evidence is "eyewitness testimony", where the witness describes exactly the scenario what happened in the situation. For example – assume a person who is looking out from his door and is seeing a person killing someone else. If he/she testifies this before the court then, it will be the direct evidence because he saw the murder happening in front of his eyes and can identify the murderer.

But suppose the person in the morning found a dead body lying on the road and now if he/she testifies then that testimony would not be direct because he/she does not have any direct proof of who is the murderer and how did it happen?

Under the Indian Evidence Act, "circumstantial evidence" is included under the expression "relevant facts" and it is provided that all "relevant facts" require being proved by some evidence oral or documentary, that is to say, by direct evidence.

Circumstantial evidence, to be relied upon, must not only point to the inference to be drawn by the court, but it must be of such a nature that it can possibly lead to no other inference.

So the value of Direct Evidence is more than Circumstantial Evidence, as in the aforementioned example, there is a direct proof of who killed the individual, unlike in the other situation where a body was seen lying and no one knew who and how did the murder happen. But this is not always true. There are many cases where solely on the basis of circumstantial evidence conviction has happened.

Can someone be convicted on just circumstantial evidence?

On account of **Chandmal v Province of Rajasthan, AIR 1976 SC 917.**, the court has held that in circumstances where the case is completely in light of the circumstantial proof the three conditions must be satisfied:

1) The conditions on which we depend for proving must be built up immovably.

2) The conditions must be exact and they should point towards the blame of the individual who is denounced.

3) When every one of the conditions taken in general they should shape a total chain and there must be no escape clause in the chain. It must show that the blamed just could have carried out the wrongdoing and no one else could have done it.

In the instance of **Sathya Narayan v State, 2013 (8) SCC 138**. it has been held that in specific cases it is conceivable where no immediate proof or observer is accessible, in such a circumstance the court can grant conviction exclusively on the premise of circumstantial proof if the accompanying five standards are connected:

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1) *"The conditions from which the finish of blame is to be drawn ought to be completely built up. The conditions must be or ought to and not might be built up.*

2) *The realities so settled ought to be predictable just with the speculation of the blame of the denounced, in other words, they ought not to be clarified on some other theory aside from that the charged is blameworthy.*

3) *The conditions ought to be of a decisive sort and propensity*

4) *They ought to avoid each conceivable theory aside from the one to be demonstrated*

5) *There must be a chain of confirmation so entire as not to leave any sensible ground for the finish of the charged and should demonstrate that conflicting with the guiltlessness of the blamed, what\'s more, must demonstrate that in all human likelihood the demonstration probably is finished by the accused.\"*

In another case of **Khem Karan v State of U.P, AIR 1974 SC 1567**, the court stated that-: "*If all the circumstances and the evidence point towards the guilt of the accused and there is no possibility of any other alternative hypothesis then in such a situation only the accused can be convicted solely on the basis of circumstantial evidence."*

Q. Explain the differences between the civil proceedings and criminal proceedings relating to admissibility of character evidence.

The word **'Character'** denotes "the collective qualities or characteristics especially mental and moral that distinguish a person or thing. Character differs from conduct.

And **'Conduct'** is a stray act, it is a single act, done on one occasion while a character is a continuous act and there is a repetition of the same act.

The character and conduct of people play a very important role in our day to day lives, people act and react and go about their daily lives based on their assumptions of what other people will do. Thus, when a court is asked to judge a person's conduct on a particular occasion it may become pertinent to question the person's conduct. [1]

In our law the word Character has no sure meaning, Under Indian Evidence Act, 1872, Explanation under Section 55 defines it as the word "character" includes both reputation and disposition; but (except as provided in section 54), evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

The definition basically constricts down the word character into two things which is reputation and disposition, where the former means the opinion that people, in general, have about someone or something, or how much respect or admiration someone or something receives, based on past behaviour or character [2] and the latter means the habitual behaviour of a particular person.

As of the law, the Character evidence is admissible with certain conditions and restrictions.

Relevancy of Character Evidence in Civil Cases

Section 52 of Evidence Act, *in civil cases, character to prove conduct imputed, irrelevant.*

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The general rule is that in civil cases, person's character is irrelevant to show such person's conduct is predictable or not.

Thus the general principle is that a party cannot give evidence of his good character for the purpose of showing that it is unlikely that he should be guilty of the conduct charged to him.

This principle was laid down in the year 1791 in ***Attorney General v. Bowman,* (1791) 2 Bos. & P.532 : 126 E.R. 1423**, where the defendant was tried in a penal action, not a criminal prosecution, for keeping false weights and for offering to corrupt an officer. He called a witness to testify that he was a man of good character and conduct.

But EYRE, C.B. refused to admit the evidence as it was a civil suit. It was not a direct prosecution of crime, but only for penalty.

Relevancy of Character Evidence in Criminal Cases

Section 53 *In Criminal cases previous good character relevant*

As per section 53 of Evidence Act, in criminal cases, the fact that the person accused is of a good character is relevant.

Thus every accused person can give evidence of the fact that he is a man of good character.

Section 53A *Evidence of a character of previous sexual experiences not relevant in certain cases.*

This section has been brought in by the amendment of 2013. Where the growing crimes of rape necessitated some changes in the Indian Penal Code, 1860, Criminal Procedure Code, 1973 and Indian Evidence Act, 1872.

This section is one such method of protecting the victim of rape.

This section applies to the prosecutions of offences under sections 354 (Assault or criminal force to woman with intent to outrage her modesty), 354A (Sexual harassment and punishment for sexual harassment), 354 B (Assault or use of criminal force to woman with intent to disrobe), 354 C (Voyeurism), 354 D (Stalking), 376 (Rape), 376 A (Intercourse by a man with his wife during separation), 376 B (Intercourse by public servant with woman in his custody), 376 C (Intercourse by superintendent of jail, remand home, etc.), 376 D (Gang Rape), 376 E (Punishment for repeat offenders) of India Penal Code.

This section applies even to attempt to commit such offenses.

This section declares irrelevant the evidence of the character of the victim of rape or her previous sexual experiences with any person, then declares that the evidence of her character or her previous sexual experience with any person is irrelevant on the quality of issue of such consent.

Section 54 *Previous bad character not relevant, except in reply.*

The section provides that, the prosecution cannot lead with the evidence of the bad character of the accused as a part of the original case, they can produce evidence of bad character only in reply to rebut when the accused produces evidence of his good character.

Explanation 1 states that this section doesn't apply to the cases where the fact in issue is the bad character of the person.

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For example, In case of divorce, wife files case of divorce on the ground of cruelty by husband, in these cases the section doesn't apply, as the issue is the character of the husband whether he was cruel towards her or not.

Explanation 2 states a previous conviction is relevant as evidence of bad character.

Section 55 *Character as to affecting damages*

The principle laid down by the section 55 if the character of a person is to affect the amount of damages he should receive the evidence of character becomes relevant.

While evidence of bad character of the plaintiff may be given in order to mitigate the extent of damages, evidence of good character may not be given in order to increase the extent of liability.

This is mostly used in cases of defamation when a person causes injury to another's reputation and damages are calculated on the basis of the person's character.

Explanation states that, in sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but, [except as provided in section 54], evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition was shown.

Disposition means to the inherent qualities of a person and the qualities that a person acquires through their upbringing, education or material conditions in life.

Reputation refers to the general estimation with which a person is held. When you say that a person has a reputation you are talking about the general estimation in which a person is held, for example, one may have the reputation of being a liar. So people generally perceives of him is to be a person who tells untruth.

In the case of **Scott V. Sampson, (1882) 8 QBD 49** , held that the word 'character' for this purpose is taken to mean a man's reputation, and the evidence of character was required to be confined only to "general evidence of reputation".

Evidence of a person's good or bad character can be given only by those who know him and have had dealings with him, for his character is the esteem in which he is held by others who know him, and are in a position to judge his worth.

Q. "All admissible evidence is relevant but all relevant evidence is not admissible"- Explain.

The word relevant means any two realities to which it is connected are so identified with one another that, as stated by, the regular course of occasions, one, either taken without anyone else present or in association with different actualities, demonstrates or renders in the cards the past, present or future presence or on presence of the other. A truth in issue is a vital part of a right or risk; in light of the fact that from such certainty, either without anyone else present or in association with other reality, the presence or non-presence of a right or obligation fundamentally accompanies. An important reality then again is not an essential element of a right or obligation. An actuality in issue is known as the 'rule truth' or factum probandum and the applicable reality the 'evidentiary certainty' or factum probans. Where immediate proof concerning a truth in issue is not accessible, it may be demonstrated by conditional confirmation; and in such a case each spot of fortuitous proof might be an occurrence of an "applicable" reality. In an instance of homicide, in the event that it be demonstrated against the charged that he had the intention to slaughter the perished, that he had the chance and made arrangements to murder, that instantly after the expired

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was killed the blamed was seen fleeing from the spot of homicide with a sword under control, that his garments and the sword were both stained with blood, and that, presently a while later, he hid the blood stained dress, and the sword, the certainty of his being the killer is demonstrated as decisively as by the affirmation of the persons of irreproachable credit who may have really seen him submitting homicide. Yet none of these actualities is vital component of the risk to be hanged; as the law does not require, as a state of point of reference, evidence of any of the realities specified above to rebuff the man with death. None of these realities, in this way, is a reality of issue; yet every one of them are "significant" since they bear the cost of great material for the surmising that the truth in issue did happen, in particular the blamed killed the expired.

Relevant Evidence: "Relevant Evidence is evidence that makes a fact more or less likely to be true than it would be without the evidence (looking for probative value). Relevant evidence may be excluded for unfair prejudice, confusion, or waste of time. Relevant evidence is generally admissible and irrelevant evidence is never admissible. Two leading principles on relevance: 1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and 2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it. Relevancy exists as a relation between an item of evidence and a proposition sought to be proved."

In an American case of *Knapp v. State*, the rule of law stated by the court was that "the determination of the relevancy of a particular item of evidence rests on whether proof of that evidence would reasonably tend to help resolve the primary issue at trial."

Logical Relevance vs. Legal Relevance

"A reality which is sensibly applicable may not be lawfully pertinent under the procurements of the Evidence Act, thus might be forbidden in proof. All allowable confirmation is pertinent, yet all applicable proof is not so much permissible. All certainties which are permitted by the procurements of the Evidence Act to be demonstrated are important; be that as it may, however pertinent a certainty may be, unless it is permitted to be demonstrated by the procurements of the Evidence Act, it is not allowable.

A fact is said to be logically relevant to another when it bears such a causal relation with the other as to render probable the existence or non-existence of the latter. As stated above, all facts which are logically relevant are not legally relevant. One fact is said to be legally relevant to another, only when the one is connected with the other in any of the ways referred to in Sections. 5 to 55 of the Evidence Act.

Logical relevancy is wider than legal relevancy; every fact which is legally relevant is logically relevant, but every fact which is logically relevant is not necessarily legally relevant. Thus, a confession made to a police officer may appear to be logically relevant, but such a confession is not legally relevant, for Section 25 of the Act declares that it cannot be used as evidence against the person making it.

The Indian Evidence Act lays down, in Sections 5-55, what facts are relevant; but the mere fact of logical relevancy does not ensure the admissibility of a fact. Very often, public considerations of fairness and the practical necessity for reaching speedy decisions necessarily cause the rejection of much of the evidence which may be logically relevant.

Thus, all evidence that is admissible is relevant, but all that is relevant is not necessarily admissible. Relevancy is the genus of which admissibility is a species. Thus, oral statements which are hearsay may be relevant, but not being direct evidence, are not admissible.

Legal relevancy is, for the most part, based upon logical relevancy, but it is not correct to say that all that is logically relevant is necessarily legally relevant and vice versa. Certain classes of facts which, in ordinary life, are relied upon

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as logically relevant are rejected by law as legally irrelevant. Cases of exclusion of logically relevant facts by positive rules of law are:

(i) Exclusion of oral by documentary evidence: Sections 91-99.

(ii) Exclusion of evidence of facts by estoppel: Sections 115-117.

(iii) Exclusion of privileged communications, such as confidential communications with a legal adviser, communication during marriage, official communications, etc.: Sections 121-130".

Admissibility: Admissibility means that the facts which are relevant are only admissible by the Court.

According to section 136 of the Indian Evidence Act, 1872, however, the final discretion on the admissibility of evidence lies with the judge. Section 136 states that:

"When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise. If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last- mentioned fact must be proved before evidence is given of the fact first- mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking. If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

"The essential ingredients of the above section are:

1. It is the judge who decides the questions of relevancy and admissibility.

2. When a party proposes to adduce evidence of any fact, the judge may ask the party to clarify 'in what manner' the fact would be relevant.

- The judge would 'admit' the particular adduced fact only if he is satisfied with the answer of the party that it is, indeed, relevant under one or the other provisions of S. 6 to 55. Thus the consideration of relevancy comes first and of admissibility later and the judge will admit the fact only if it is relevant."

In the recent case of ***Ram Bihari Yadav v. State of Bihar, [1998] AIR 1859 (SC)*** the Supreme Court observed that "More often the expressions 'relevancy and admissibility' are used as synonyms but their legal implications are distinct and different from for more often than not facts which are relevant are not admissible; so also facts which are admissible may not be relevant, for example questions permitted to put in cross examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regards to the fact and circumstances of each case."

Section 9 of the Law of Evidence Act, 1872, lays down some facts which can be treated as relevant. In the case of ***Lakshmandas Chaganlal Bhatia v. State, [1968] 69 AIR 807 (Bom)*** the court laid down the following to be "relevant facts:

1. Facts necessary to explain or introduce a fact in issue or relevant fact;

2. Facts which support or rebut an inference suggested by a fact in issue or a relevant fact;

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3. Facts which establish the identity of anything or person whose identity is relevant;

4. Facts which fix the time and place at which any fact in issue or relevant fact happened;

5. Facts which show the relation of parties by whom any fact in issue or relevant fact was transacted."

Another section of the Evidence Act which deals with admissibility is the Section 11. Section 11 deals with those facts which are not otherwise relevant but become relevant if they are inconsistent with any relevant fact or they make the existence or non-existence of any relevant fact highly probably or improbable.

In ***Sheikh Ketab-Uddin v. Nagarchand Pattak*** **[1927] AIR 230 (Cal)** it was held, that where the executants of an archive holding presentations of boundaries of land are alive and don't give their evidence, such archives are not acceptable under this segment.

In ***Ambikacharan v. Kumuk Mohan, [1928] AIR 893 (Cal)*** Cummin and Mukherji held that as a general rule, Section 11 is controlled by Section32, "when the evidence consists of statement of persons who are dead and the test whether such a statement is relevant under Section 11, though not relevant and admissible under Section32, is that it is admissible under Section 11, when it is altogether immaterial whether what said was true or false, but highly material that it was said."

In the case of ***Bibi Khaver v. Bibi Rukha, [1904] 6 AIR 983 (BLR)*** the court held that "in order that a collateral fact may be admissible as relevant under this section, the requirements of the law are that:

1. The collateral fact must itself be established by normally conclusive evidence; and

2. It must, when established, afford a reasonable presumption or inference as to the matter in dispute." However, there are limitations to Section 11. According to ***R. v. Prabhudas, [1874] 11 AIR 90 (BHCR)*** "the court must use exercise a sound discretion and see that the connection between the fact to be proved and the fact sought to be given under S.11 to prove it, must be so immediate as to render the co-existence of the two highly probable. The section makes admissible only those facts which are of great weight in bringing the court to a conclusion one way or the other as regards the existence or the non-existence of the fact in question. The admissibility under this section must, in each case, depend on how near is the connection of the facts sought to be proved with facts in issue and to what degree do they render facts in issue probable or improbable when taken with the other facts in case. There must always be room for the exercise of discretion when the relevancy of the testimony rests upon its effect towards making the affirmative or negative of a proposition 'highly probable', and, with any reasonable use of the directions, the court ought not to interfere."

Another limitation mentioned in the case ***Bela Rani v. Mahabir, [1912] 34 AIR 341 (SC)*** is that "s.11 is also controlled by Sections 17 to 39. And as to the admissibility of depositions made by a person since deceased, it has been held that unless they are admissible under Sections 32 and 33, Section 11 will not avail to make them evidence."

CONCLUSION: logically relevant: the dictionary meaning of the term 'relevancy' is given as 'the relation of something to the matter at hand', 'pertinence', 'connection', 'materiality' etc. If one fact is connected to the other logically, it is called logical relevancy and it may be based on several factors. For instance if a severed dead body is found on a railway track, it can be inferred that the death occurred because of the train running over the person. On a closer observation, it is found that there is no hemorrhage near the body, the first inference is then replaced by another inference that the person was killed elsewhere and the dead body was thrown on the railway track to create the

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misleading impression that he was run over by the train. Here the inferences are drawn on the basis of logic based on cause and effect. If two or more persons have committed the offence at the same time and place, it can be inferred that they were acting with common intention.

Legal relevance: while logical relevance is certainly an important factor in determining the probative value of facts, it so happens that the facts may be connected to each other by varying degrees of logical proximity and immediate causes and effects, and remote, indirect and even conjectural causes and effects. Hence, the courts should let in only those facts which have a high degree of probative value that would help the courts to decide one way or the other with relatively greater certainty.

Consequently, the Evidence Act adopted the device of declaring as relevant in section 6 to 55 only those logically connected facts which are considered to have a high probative value. Thus, facts which may be connected to each other so remotely that they cannot be considered to have high probative value are kept outside the purview of the provisions of ss. 6 to 55. Facts legally relevant under the Evidence Act means, simply, facts declared to be relevant under section 6 to 55 and this is part of the legislative and not judicial determination."

Hence, all logically relevant facts are not legally relevant and all legally relevant facts may not be logically relevant.

Q. Explain the doctrine of "Res Gestae".

Section 5 of the Indian Evidence Act lays down that evidence may be given of fact in issue and relevant fact described under Section 6 states:

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place of at different times and places."

The principle of law embodied in S.6 is usually known as the doctrine of *res gestae*. Facts which may be proved, as part of res gestae, must be facts other than those in issue but must be connected with it. Though hearsay evidence is not admissible, when it is res gestae it can be admissible in a court of law and may be reliable evidence. This section is used by lawyers as a last resort so; there is not much case law on this section.

The rationale behind this is the spontaneity and immediacy of such statement that there is hardly any time for the concoction. So, such statement must be contemporaneous with the acts which constitute the offense or at least immediately thereafter.

Res gestae includes facts which form part of the same transaction. So, it is pertinent to examine what is a transaction, when does it start and when does it end. If any fact fails to link itself with the main transaction, it fails to be a res gestae and hence inadmissible. Res gestae include elements that fall outside of the modern hearsay definition altogether, such as circumstantial evidence of the state of mind, so-called "verbal acts," verbal parts of acts, and certain non-verbal conduct.

Because excited utterances are connected closely in time to the event and the excitement flows from the event, excited utterances were deemed part of the action (the "things done") and hence, admissible despite the hearsay rule. Res gestae also hired the hearsay exceptions for present-sense impressions, excited utterances, direct evidence of the state of mind, and statements made to physicians.

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MEANING OF RES GESTAE

Res gestae has no exact English translation. A literal translation means "something deliberately undertaken or done". Few areas of the common law of hearsay are in greater dispute than the doctrine of res gestae. Dean Wigmore comments, "The phrase res gestae is, in the present state of the law, not only entirely useless but even positively harmful… It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. It should never be mentioned."

Res gestae has been defined as, "Things did, or liberally speaking, the facts of the transaction explanatory of an act or showing a motive for acting; a matters incidental to a main fact and explanatory of it; including acts and words which are so closely connected with a main fact as will constitute a part of it, and without a knowledge of which the main fact might not be properly understood, even speaking for themselves though the instinctive words and acts of participants not the words and acts of participants when narrating the events, the circumstances, facts and declaration which grow out of the main fact, and contemporaneous with it and serve to illustrate its character or these circumstance which are the atomic and undersigned incidents of a particular litigated act and are admissible when illustrative of such act." ***Vinod Kumar Baderbhai Patel v. State of Gujarat, 1998 INDLAW GUJ 22***

In ***Babulal v. W.I.T Ltd. 1956 INDLAW CAL 105***, it was observed that the statement of law in section 6 of the evidence act is usually known as Res Gestae. The literal meaning of the word 'res' is "everything that may form an object of rights and includes an object, subject matter or status".

Res Gestae has been described as a term of protean significance and that there have been many definitions of the term. No evidential problem is as shrouded in doubt and confusion as is Res Gestae. The rule as to the admissibility of evidence known as the Res Gestae rule has been declared to be incapable of any precise definition and it has been applied to so many different and unrelated situations that it has been said that the difficulty of formulating a description of Res Gestae which will serve all circumstances seems insurmountable. It would be little short of miraculous if one single doctrine of Res Gestae would suffice for every situation.

There must be a main or principal fact or transaction, and only such declarations are admissible which grow out of the principal transaction and serve to illustrate its character, and are contemporary with, and derive some degree of credit from it. The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction.

ALLEGED FACT: property recovered from accused by the deceased, the murder of the deceased. The court said that unless it could be conclusively established that the property was with the deceased at the time of the offense, the question of the property would not be good enough nexus with the murder. ***Annasuyamma vs. State of Karnataka, 2002 INDLAW KAR 99***

A TEST FOR ADMISSION OF EVIDENCE UNDER RES-GESTAE

The primary question which the judge must ask oneself is-can the possibility of concoction or distortion is disregarded?

To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy him that the event was as unusual or starting or fanatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection.

In order for the statement to be sufficiently 'spontaneous', it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declaring was still dominated by the event.

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Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative.

Quite apart for the time factor, there may be a special feature in case, which relates to the possibility of concoction or distortion.

As to the possibility of a report on the facts narrated in the statement if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not the admissibility of the statement and is, therefore, a matter of jury.

To sum up, it can be laid that the test to be applied in deciding whether a hearsay statement made by a bystander or victim indicating the identity of the attacker is admissible can be put succinctly;

1. Was the identification relevant?
2. Was it spontaneous?
3. Was there an opportunity for concoction?
4. Was there any real possibility of error?

If the exited utterance is relevant, the statement will be admissible if the answer to the second question is also yes, and the answer to the other question is not otherwise the statement is inadmissible. A statement may be spontaneous even though made in response to questioning. ***R vs Smart 2004 EWCA Crim 2072***.

WHERE DOES THE JUDICIARY STAND?

The test of admissibility, on one hand, relies on the exact contemporarily approach laid down inBedingfield's case in contrast to the flexible and accommodating approach laid down in Foster's case. It was precisely with a view to settle this ambiguity that the Privy Council in **Rattenv. Reginam, 1971 INDLAW PC 6** entirely dispensed with the test of contemporaneity and adopted the test of "spontaneity and involvement".

Lord Wilberforce in Ratten's case contended that the test should not be the uncertain one whether the making of the statement was in some sense part of the transaction. This may often be difficult to establish and therefore he emphasized on spontaneity as the basis of the test. He asserted that "hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

Courts began focusing on how long the excited condition lasted rather than focusing on when the statement was made and thus liberalized the strict timing requirement. Apparently reluctant to explicitly follow Wigmore, judges first expanded the exception by categorizing statements as "contemporaneous enough."

Like India present day rulings in England and America tend to indicate that the utterance must be spontaneous or natural, and though not precisely contemporaneous must be substantially so. There can be no fixed limit of time each case must depend upon its own circumstances. How slight separation of time and place is sufficient to render evidence of a statement inadmissible?

Where a witness in describing the offense asserted that B said: those ruffians who a year ago took away Subhashini have again come. It was held that the time of the occurrence in respect of the occurrence it is res gestae under

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Section 6. But statement however made at the time of an occurrence relating to a previous occurrence which took a year is not res gestae.

Thus the principal of admissibility of declarations accompanying acts can be summarized as;

1. The declaration (oral and written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover, the declaration must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.

2. The declaration must be substantially contemporaneous with the fact and not merely the narrative of a past.

3. The declaration and the act may be by the same person, or they may be by a different person, e.g. the declarations of the victim, assailant, and bystanders. In the conspiracy, riot the declarations of all concerned in the common object is admissible.

4. Though admissible to explain or corroborate, or to understand the significance of the act, the declaration is not evidence of the truth of the matters stated.

A spontaneous exclamation is admissible because "under certain external circumstances of physical shock a state of nervous excitement may be produced which stills the reflective faculties and removes their control so that the utterance which occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock."

The traditionally cited principle behind this exception is that an individual who makes a statement immediately after a stressful event lacks sufficient time or capacity to fabricate a lie about what happened. Thus, this class of statements contains sufficient indicia of reliability so as to be admitted despite its hearsay character.

In a case, the accused had killed his wife and daughter. The deposition by the father of the deceased that the father of the accused made a telephone call to him and said that his son had killed the deceased was found to be not admissible. The question before the court was that was that can the deposition of the accused father beadmitted under Section. 6 as a hearsay exception being part of Res Gestae?

In the absence of finding as to whether the information given by accused father to father of the deceased that accused had killed his wife and daughter, was either at the time of the commission of the crime or immediately thereafter so as to form part of the same transaction declined to accept the evidence as relevant under section 6.

In ***State of Andhra Pradesh vs. Gentela Vijayavardhan Rao, 1996 INDLAW SC 2361*** the appreciable interval between the act of carnage and magistrate's recording the statement recorded by the magistrate was found inadmissible under res gestae.

In ***Bishna vs. State of West Bengal, AIR 2006 SC 302*** where the two witnesses reached the place of occurrence immediately after the incident had taken place and found the dead body of Prankrishna and injured Nepal in an unconscious state. One of them found the mother of Prannkrishna and Nepal weeping and heard about the entire incident from an eye-witness and the role played by each of the appellants, their testimony was held to be admissible under Section 6 of the Evidence Act.

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In all the cases mentioned above the test applied to make the evidence admissible was to consider that was the statement was made at the spur of the moment without an opportunity to concoct and fabricate anything. Where the judges are satisfied that the reaction was the most immediate result of the circumstances being relevant to the facts in issue, they have allowed such evidence to be admitted.

EXPANSION OF THIS DOCTRINE

Courts have slowly broadened the scope of this section to cases like domestic violence, child witness etc.

Domestic violence and assault cases necessarily involve a startling event; they often include the issue of excited utterances. In these cases, it is only victims who can identify the alleged culprit. So such testimony of the victims must be admitted.

In India, women may not react just after the crime of rape or sexual violence because they are under the influence of such gruesome event that they do not respond immediately. It is possible that they respond after a day or two but such statement spoken can still be admitted under res gestae. If it can be proved that the victim was still under the stress of shock then such a statement can be admitted.

Usually, cases of rape take place in isolation. So there is no eye witness to such an event. Rape and domestic violence cases are different than any other crime.

The testimony of children is often the subject of excited utterance debate. Usually, whenever there is a time gap, the transaction is said to end and any statement which does not form part of the transaction is inadmissible. However, in cases of children, this rule is relaxed. The rationale for expanding the exception for children emphasizes how children cope with stress because their statements are often made well after events occur at the first safe opportunity to speak.

In ***Uttam Singh vs. State of Madhya Pradesh, 2002 INDLAW MP 79*** the child witness was sleeping with the deceased father at the relevant time of the incident and was awakened by the sound of the fatal blow of the axe on the neck of the deceased. Seeing it, the child shouted to his mother for help by naming the accused as the assailant.

On hearing the sounds the mother and sisters of the child and other witnesses gathered at the spot. This evidence was held to be admissible as a part of the same transaction as such shout was the natural and probable as per the facts of the case. In this case, if child witness failed to react on the spot but spoke later, it could still be admissible under Section 6.

CONCLUSION: Usually, the evidence is brought under res gestae when it cannot be brought under any other section of the Indian evidence act. The intention of law makers was to avoid injustice, where cases are dismissed due to lack of evidence. If any statement is not admissible under sec. 6 it can be admissible under Sec.157 as corroborative evidence.

Court has always minded that this doctrine should never be expanded to an unlimited extends. That is why Indian courts have always considered the test of “continuity of the transaction”. Any statement which was made after a long time gap and which was not a reaction to the event is not admissible under Section 6 of the Evidence Act.

But courts have permitted certain statement which was spoken after a long time gap from the occurrence of the transaction because there was sufficient proof that the victim was still under the stress of excitement and so whatever was said was as a reaction to the event.

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The strength of Section 6 lies in its vagueness. The word transaction used in this section is not distinct. It varies from case to case. Each case in criminal law should be judged according to its own merit. When it is proved that the evidence forms part of the same transaction it is admissible under sec. 6 but whether it is reliable or not depends on the discretion of the Judge.

Q. Define the terms "Fact in Issue", "Fact". "Facts not otherwise relevant become relevant" – Discuss with decided case laws.

Fact: *"Fact means and includes-*

(1) Anything, state of things, or relation of things, capable of being perceived by the sense;

(2) Any mental condition of which any person is conscious."

Fact basically means an existing term. It does not refer to a mental condition of which a person is conscious. It is not limited to tangible or what is visible. The statements, feelings, opinion and state of mind are as much fact as any other fact which is tangible and visible. Facts can be of two types:

Physical and Psychological: Physical facts are those facts which can be perceived by five senses. For example; a horse or a man. Psychological fact is considered to have its seat in some animate being and by that virtue of the quality by which it is constituted animate. For example, intention, fraud, good faith and knowledge. The court takes cognizance only of those facts which appear on the record. Things that do not appear and things that do not exist, reckoning in a court of law is the same.

Positive and negative facts: The existence of a certain state of things is a positive fact, the non- existence of it is a negative fact.

Fact in issue: *"The expression facts in issue means and includes –any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied on any suit or proceeding, necessarily follows.*

Explanation – Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue."

These are those facts which are alleged by one party and denied by the other in the pleading in a civil case or alleged by the prosecution and denied by the accused in a criminal case. These are the facts of which existence or the non-existence is disputed by the parties. The expression means the matter which is in dispute or which form the subject of investigation.

Matter of fact and matter of law: Matter of fact is anything which is the subject of testimony and can be proved by evidence. Matter of law is general law of land of which the court will take judicial notice. It is not to be proved by evidence.

Relevant: *"One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."*

Relevant can be interpreted in two ways; firstly it means connected and secondly, it means admissible. Relevancy means the connection of events as cause and effect. It has a certain degree of probative force. A fact becomes

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relevant only when it is connected with other facts in any of the ways referred to in this Act relating to the relevancy of facts. In order to be a relevant fact, a fact should be connected with the facts in issue. A fact not so connected is not a relevant fact. When a fact is connected with another fact, it is logically relevant but it is legally relevant if the law declares it to be relevant. If the law does not declare it to be relevant, it is not admissible as evidence.

Facts not otherwise relevant becomes relevant

Section 11 of the Indian Evidence Act, 1872 deals with facts which ordinarily have nothing to do with that of a case are not in themself , but they have become to the relevant only by virtue of fact that they are either inconsistent with any fact in issue or relevant fact or they make the existence of a fact in issue or relevant fact either highly probable or improbable.

Section 11: When facts not otherwise relevant become relevant

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

Inconsistent Facts: Plea Alibi: This section enables a person charged with a crime to take what is commonly called the plea of alibi which means his presence elsewhere at the time of crime.

His present elsewhere is consistent with the facts that he should be present at place of the crime.

Where, for example, a person with charged with murder which took place at calcutta, he can take the defence that on the day in question he was in Bombay. In order to prove his presence in Bombay he may show his attendance at some place, for example the fact that he visited a doctor or a vakil and he noted his visit in a professional diary or that he posted a letter written by himself on that day from Bomaby, or that he encashed a cheque at Bombay.

In **Munshi Prasad v. State of Bihar (2001)** A distance of 400-500 yards between the place of occurrence and the place where the accused was claimed to be present (present in g panchkula meeting) was held to be not amounting to present elsewhere. It could not be an impossibility that one could be present at both the place or less simultaneously.

The fact that the accused advanced a false plea of alibi cannot by itself be a proof of the fact that he was responsible for the offence.[**Govind v. State of M.P. (2005)]**

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Facts showing probabilities: Evidence can be given of every fact which by itself or in connection with other facts makes the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

For example there are five persons in a room and one of them is murdered in circumstances which show that it is the handiwork of any one or more of them. Evidence will be allowed of every fact which makes it probable which one of them caused the death or which one of them was probably not connected with it.

Where a person is charged with cheating, evidence can be given of the fact that he belong to an organisation of habitual cheats as this would make it probable that the committed the crime- [**Kalu Mirza v. Emperor (1909)]**

Facts which makes thing highly improbable are also relevant: In **Santa Singh v. State of Punjab (1956)** The witnesses testified that they saw the deceased being shot from a distance of twenty-five feet. The medical report showed that the nature of the wound was such that it could have been caused only from distance less than a yard. Thus, the expert opinion rendered the statement of witnesses highly probable.

This section is too wide in its import. It does not place any restriction upon the range of facts that can be admitted as showing inconsistencies or probabilities.

It leaves the whole thing at the discretion of the court.

In **Reg. v. Prabhudas (1874)** where to prove the offence of forgery by the accused, evidence was offered of other forged documents found in his possession, as this would make it probable that he committed the forgery.

In **Umashanker v. State of Chattisgarh (2001)** in a charge of passing a fake currency note, the relevancy of possession of other fake note proved mens rea or guilty state of mind or knowledge.

Q. Define Hearsay Evidence. When hearsay evidence is admissible and why it is admissible?

Meaning of Hearsay Evidence: Hearsay Evidence means whatever a person is heard to say it includes: i) A statement made by a person, not called as witness; ii) A statement contained or recorded in any book, document or record which is not admissible. The hearsay witness may not be able to say correctly and completely the truth of his statement.

Definitions :

Taylor: 'All the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person.

Bentham: The supposed oral testimony transmitted through oral, supposed orally delivered evidence of a supposed extra judicially narrating witness judicially delivered viva voce by the judicially deposing witness

Hearsay Evidence means whatever a person is heard to say... it includes...

1) a statement made by a person , not called as witness

2) statement contained or recorded in any book, document or record which is not admissible.

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Oral evidence must be direct : Evidence given by the witness may be oral or documentary. Section 60 of the Indian Evidence Act says that, oral Evidence to be admissible, it must be direct. In other words, Hearsay Evidence is no evidence.

A statement oral or written, by a person not called as witness comes under the general rule of hearsay.

Section 60 of Indian Evidence Act reads as follows :

Oral evidence must, in all cases, whatever, be direct; that is to say -

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to opinions or to the grounds in which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds -

Provided that the opinion of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Conditions: As stated above, The fundamental principle of law of evidence is: Hearsay Evidence must not be admitted. Hearsay Evidence is also known as derivative or second hand or unoriginal evidence. It is the evidence of facts, which the witnesses has not learnt through his own bodily senses, but learnt through the medium of others. It is regarded as ambiguous and misleading.

Exclusion of hearsay evidence: Section 60 excludes hearsay Evidence. The evidence of fact the happening of which could be seen can be given only by an eyewitness. If the evidence refers to a fact which could be perceived by any order sense or in any other manner, it shall be the evidence of a person who Personally perceived it by that sense or in that manner.

Thus in all cases, the evidence has to be that of person who himself witnessed the happening of the fact of which he gives Evidence. such witnesses is called as eye witnesses or a witness of fact and the principle is known as that of direct Oral Evidence or of the exclusion of hearsay Evidence.

Reasons for Exclusion of Hearsay Evidence: The reasons for exclusion of hearsay Evidence are as follows

1) Hearsay Evidence cannot be tested by Cross-Examination.

2) It supposes some better evidence and encourages substitution of weaker for stronger evidence.

3) Hearsay Evidence is intrinsically weak.

4) The evidence is not given on oath or under personal responsibility by the original declarant.

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5) It has a Tendency to protect legal investigation

6) As truth depreciates in the process of repetition, it is not reliable.

7) Its reception will increase opportunities for fabrication

Exceptions : Exceptions to hearsay Evidence are as follows :

1) **Res gestae under Section 6:** The statement of a person may be proved through another person who appears as a witness if the statement is a part of the transaction issue

2) **Admission and Confessions (Under Section 17 - Section 23 and Section 24 - Section 30):** An admission of liability or confession of guilt which takes place outside the court is proved through the testimony of the witnesses to whom the admission or confession was made. such witness is not a witness of fact as he has not seen or observed the main occurance through nay of his sense but had only heard about it from the mouth of the party who admitted his liability or confessed to the guilt.

3) **Statement Relevant :** Statements by a person who cannot be called as a witness (Dying Declaration. Section 32(1). Statements, which are mostly the statements of the deceased persons who are not available as witnesses. The evidence of such statement is therefore, the evidence of hearsay and it specially declared to be relevant.

4) **Evidence given in the former proceedings (Section 33)** It is provided that evidence is given by a witness in the proceeding can be used as an evidence of the truth of the facts stated in any subsequent proceeding between the same parties, provided that the witness has died or is, for some other reasons, not available.

5) **Statements in public documents (Section 35)** The statement in public document such as, the Acts of the Parliament, official books and registers can be proved by the production of the documents and it is not necessary to produce before the court the draftsman of the documents.

6) **Opinions of Experts (Section 45- Section 51) :** It is provided that the opinion of experts expressed in any treaties commonly offered for sale and the ground on which such opinions are held may be proved by the production of such treaties if the author is dead or cannot found or become incapable of giving evidence, or cannot be called as witness without an amount of delay or expense which the court regards reasonable. Thus the opinion of experts can be cited in his absence only.

7) **Entries in books of Accounts (Section 34)**

Q. Under what circumstances secondary evidence relating to documents may be given? Distinguish between 'Public Document' and 'Private Document'.

The Cases in which Secondary Evidence relating to documents can be given

Section 61 of the Indian Evidence Act, 1872 deals with proof of contents of documents. It provides that the contents of documents may be proved either by primary evidence or secondary evidence. Secondary evidence also known as "inferior of substituted evidence". Section 63 of Indian Evidence Act defines Secondary Evidence.

Secondary Evidence: According to Section 63 of Indian Evidence Act, Secondary evidence means and includes :

1. Certified copies given under the provisions hereinafter contained;

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2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies;

3. Copies made from or compared with the original;

4. Counterparts of documents as against the parties who did not execute them;

5. Oral accounts of the contents of a document given by some person who has himself seen it.

Examples

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence, but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photo graph or machine copy of the original, is secondary evidence of the original.

According to Section 65.of the Indian Evidence Act, 1872 Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;

b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

d) When the original is of such a nature as not to be easily movable;

e) When the original is a public document within the meaning of Section 74;

f) When the original is a document of which a certified copy is permitted by Evidence Act, or by any other law in force in India to be given in evidence;

g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collections. In cases (a), (c) and (d), any secondary evidence of the contents of the documents is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

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Public Document v/s Private Document

1. Sec. 74 defines what the **Public** documents are where as Section 75 defines that all other documents are private.

2. All the public documents are kept in some special custody of the authority on the other hand all the private documents are kept in the hands of private persons under their own custody

3. Certified copies of the Public Documents shall be given to any person demanding it on paying prescribed fee where as certified copies cannot be given pertaining to private documents. In fact the words certified copies do not arise in private custody.

4.Public documents are open to inspection to any person but Private Documents are not open for in section to any person.

5. Mode of proof: The mode of proving public documents has been provided in Sections from 76 to 78 on the other hand the mode of proving private documents has been provided in Sees, from 61 to 73.

6. A public document is one prepared by a Public servant in discharge of his public-official duties whereas a private document is one prepared between the persons for their usual business transaction and communications.

7. Certified copies of the public document can be received in evidence and without proof but certified copies of the private document, generally, cannot be taken in evidence. If taken there must be proof of original document.

8. Examples: Documents forming the Acts, or records of the Act, of the sovereign authority, Tribunals, public officers, legislative, judicial and executive, etc. are public

Correspondence between persons, Any matter published in newspaper, books etc. are private

9. Sec. 77 provides that certain original public document need not be produced before the Court. Certified copy is sufficient but there is no such protection is private document, the original must be produced before the Court.

Q. Discuss the evidentiary value of "Dying Declaration." If the victim makes a Dying Declaration, subsequently survives—Explain whether the said Dying Declaration is under the purview of section- 32 of Evidence Act.

Introduction: Dying Declaration means a statement made regarding the cause of his death or the circumstances of the transaction which resulted in his death by a person on death bed. In **Uka Ram v. State of Rajasthan (AIR 2001 SC 1814)** Apex Court held that, "when a statement is made by a person as to cause of his death or as to any circumstance of transaction which resulted into his death, in case in which cause of his death comes in question is admissible in evidence such statement in law is called dying declaration."

So that's why these statements made by the person are allowed to be proved in court. The term '*Dying Declaration'* has not been defined in the Evidence Act but reading Section 32 and sub-section (1) of Section 32; the term dying declaration may be defined as follows:

In **Ram Bihari Yadav v. State of Bihar [AIR 1989 SC 702]**, it was held by court that "A dying declaration is a statement made by a person who is dead; as to cause of his death or as to any circumstance of transaction which resulted in his death, in cases in which death comes into question, such statements are relevant under Section 32 of Evidence

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Act, whether the person who made there was or was not, at the time when they were made, under exception of death and whatever may be the nature of proceeding in which cause of his death came into question."

Nemo moriturus praesumitur mentire

It is based on a principle named **'nemo moriturus praesumitur mentire'** which simply means that when a person is on death bed there are fewer chances that he would lie. The Apex Court in its decision in **P.V.Radhakrishna v. State of Karnataka [Appeal (crl.) 1018 of 2002]** held that 'the principle on which a dying declaration is admitted in evidence is indicated a Latin maxim, **nemo moriturus praesumitur mentire**, a man will not meet his maker with a lie in his mouth. Information lodged by a person who died subsequently relating to the cause of his death is admissible in evidence under this clause.

Dying declaration is also considered the trustworthy evidence because it is believed that if a person knows that he is about to die he will not lie. That's why it is admissible in evidence being hearsay evidence. **This piece of hearsay evidence is admissible as an exception to the general rule of evidence that hearsay evidence is no evidence in the eye of law and it should be discarded as a general rule because the evidence in all cases must be direct.**

Principles governing dying declaration: There is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. The courts have laid down in several judgments the principles governing dying declaration, which can be summed up as under:

1. There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. **[Mannu Raja v. State of M.P. (1976) 2 SCR 764]**

2. If the Court is satisfied that the dying declaration is true and voluntary, it can base the conviction on it, without corroboration. **[State of UP v. Ram Sagar Yadav, AIR 1985 SC 416]**

3. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had the opportunity to observe and identify the assailants and was in a fit state to make the declaration.**[Rama Chandran Reddy v. Public Prosecutor, AIR 1976 SC 1994]**

4. Where dying declaration is suspicious it should not be acted upon without corroborative evidence. **[Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264]**

5. Dying declaration can be the sole basis of the conviction if it inspires the full confidence of the court**. [Atbir v. Govt. (NCT of Delhi) , (2010) 9 SCC 1]**

Dying declaration made by nods and gestures: Dying declaration can also be in form of gestures and signs. In the case of ***Queen-Empress v. Abdullah [(1885) 7 All 385 FB]*** accused had cut the throat of the deceased girl and because of that, she was not able to speak so, she indicated the name of the accused by the signs of her hand, it was held by the full bench of the Allahabad High Court "If the injured person is unable to speak, he can make dying declaration by signs and gestures in response to the question."

Proximity of time between statement and death:

There has to be a proximate relationship between the statement and the circumstances of death. In **Sharad Bridhichand Sharda v. State of Maharashtra [(1984) 4 SCC 116]**, A young married woman had been speaking to her parents and other relatives and also writing to them expressing the danger to her life. She lost her life three or four

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months after that. Her statement was admitted as showing the circumstances of death. They were not too remote in time from the point of death.

Language of dying declaration: Dying declaration recorded in the language of the declarant acquires added strength and reliability. **[Najjam Faroqui v. State of W.B, 1992 Cr LJ 2574 (Cal)]**

FIR as dying declaration: In ***K. Ramachand Reddy v. Public Prosecutor [(1976) 3 S.C.C. 104}***, it was held that where an injured person lodged an FIR and then died, it was held to be relevant as a dying declaration.

According to ***Patel Hira Lal Joita Ram v. State of Gujarat*** **(AIR 2000 SC 2944)**, by Section 32 (1) two categories of a statement are made admissible in evidence. They are:

1. Cause of his death.

2. Statement as to any circumstances of the transaction which resulted in his death.

Cause Of Death: This clause lays down that when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, his statement would be relevant in a case in which the cause of his death is the point at issue. EXAMPLE- A is assaulted and dies. Before his death, he makes a statement that "B assaulted him with a spear." This statement of A is admissible as it relates to the cause of his death.

The Interval between the statement and death is immaterial. If the statement relates to the cause of deponent's death it is admissible. But if there is nothing to show that the injuries to which the statement of the deceased related was the cause of his death the statement are not admissible as dying declaration.

Declarant Died Of Injury To Be Proved: Before the statement of a person as to cause of his death may be used as dying declaration it must be proved that his death was caused by the injury he received in the incident for which the accused is being prosecuted.

In ***Chandra Bhan Singh v. State*** **(1971 CrLJ 94),** Chandra Bhan Singh was tried of the murder of Shaitan Singh. The deceased Shaitan Singh himself lodged a report in which he narrated the story of the incident. After the medical examination the deceased developed tetanus and died of it, it was held that the statement of the deceased could not be used as a dying declaration.

Circumstances Of The Transaction Which Resulted In His Death: The words "resulted in his death" do not mean 'caused his death.' The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "cause of death". A statement not relating to the cause of death of its maker may be admissible if it relates to the circumstances of the transaction which resulted in his death. In a case of robbery, a statement made by a person before her death regarding the circumstance of the robbery is admissible. Although remotely, her death was caused by wounds received at the robbery.

Exception

1. If the deceased made statement before his death which is anything other than the cause of his death, then such declaration shall not be admissible in evidence.

2. A dying declaration of a child is inadmissible.

3. An inconsistent dying declaration is of no evidentiary value.

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4. Dying declaration should not be under influence of anyone.

Q. What are the provisions to prove custom?

Where the question is as to the existence of any right or custom, the following facts are relevant:—

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;

(b) Particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from.

Illustration: The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Scope: Section 13 deals with the facts as to proof of existence of any right or custom. When any question as to the existence of any right or custom is in issue the following facts under clause (a) and clause (b) are relevants:

Clause (a): Any transaction by which the right or custom in question was,— (i) created (ii) claimed (iii) modified (iv) recognized (v) asserted or (vi) denied or (vii) which was inconsistent with its existence.

Clause (b): Particular instance in which the right or custom was: (i) claimed or (ii) recognized, or (iii) exercised or in which its existence was (iv) disputed (v) asserted, or departed from, is relevant.

Right: The rights contemplated by this section are taken to mean "the standard of permitted action within a certain sphere" which can be established by proof of "cumulative instances and transactions." It is the capacity of a person to control the actions of others. Prof. Salmond defines right as "an interest recognized and protected by the rule of right." According to the section it does mean continuing rights. The Section 13 applies all kinds of right so far recognized by the rule of law. For example corporeal and incorporeal rights, public and private rights, antecedent and remedial right, perfect and imperfect rights etc.

Right—Court's views: The word "right" used in Section 13 has been the subject matter of controversy among High Courts. The Calcutta High Court held that the word 'right' means public and incorporeal rights but does not include corporeal right. On the other hard the Allahabad, Bombay and Madras High Courts have given wider interpretation. According to these High Courts all rights recognized by this section include right of ownership as well as incorporated rights. It is now settled law that the right includes every right known to the law, private or public, corporeal or incorporeal.

Custom: A custom means those principles which have received recognition and acceptance as principles of justice and public utility. It is a transcendent law. Salmond defines "custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principle of justice and public utility. A custom is generally taken to mean the particular rule of a family, a locality or a district which has existed from the time immemorial or from long usages and has obtained the force of law. The requirement of long usage in essential and the practice must be shown to have continued in such circumstances and for such length of time that it has come to be exercised as of right.

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Under section 13 a custom can be used as evidence provided it has the force of law. For example in Hindu marriage seven steps before sacred fire is essential to give validity. It is both custom and law. Thus it must be valid.

Requisite conditions of valid custom

(a) It must be ancient i.e. its existence is beyond human memory—"Time whereof the memory of man runneth not to the contrary."

(b) It must be continuous and conform. It means that if possession for some time is disturbed, the claim to enjoy custom is not abandoned.

(c) It must be peaceable.

(d) It must be certain, define and constant.

(e) It must be compulsory and not optional.

(f) It must not be against morality or public opinion.

(g) It must be reasonable.

(h) It must not be expressly forbidden by law or statute.

Classification of Customs:

(a) General custom: General custom are those customs that prevail throughout its territory of the state. The burden of proving that a general custom is not recognized in a particular locality lies on the person who makes allegation.

(b) Private custom: It affects particular family or group of families. The burden lies on him who claims advantages from such custom. The family custom must be alleged and proved with distinctness and certainty.

(c) Public custom: Public custom is such type of custom which govern the common interests of public at large of the particular area.

Example: Right to way, right to bath etc.

(d) Local custom: The local customs means those customs which apply only to a definite locality. The local customs may be (i) Geographical local and (ii) Personal local customs. Local custom is 'binding in all persons in the local area and differs entirely from family custom.'

(e) Custom without sanction: Customs without sanction are those which are non-obligatory.

(f) Custom having sanction i.e. legal custom: These customs are binding having the force of law. They are recognized by the courts and have become part of the law.

(g) Conventional custom: Conventional customs are those customs which govern the parties to an agreement. Such customs are binding "not due to any legal authority independently possessed by them, but because it has been expressly or impliedly incorporated in a contract between the parties to it."

Proof of Custom: Under section 13 the proof of existence and non-existence of custom may be done either: (1) by transaction or (2) by instances.

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1. Transaction: In this section the term 'transaction' is understood as something already done or completed. "Whatever may be done by one person which affects another's rights and out of which a cause of action may arise, is transaction." "A transaction in ordinary sense of the word is some business or dealing which is carried on or transacted between two or more persons. It must be genuine and bona fide. Under this section 'transaction' also includes a contract but it is not confined to a dealing with property between person inter vivos. A transaction must always be genuine and bona fide transaction. A benami transaction which is fictitious in nature is not valid transaction.

Most important test for determining a benami transaction is the source from which the consideration came. The burden of proof is no doubt upon the person who claims contrary to the tenor of a deed but it can be proved only by circumstantial evidences. The transaction is one in which the vendor asserted his competency to transfer property i.e. he had some saleable interest.

Thus, according to Section 13(a) a transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied or which is inconsistent with its existence is relevant to prove the existence of a custom or a right. Under this section a judgment which has become final can be said to be a transition evidencing a right or instance. The sale deed, deed of gift, cases of res judicata etc. are instances of transaction.

2. Instance: Section 13(2) provides for particular instance which simply means an example, something which has already been occurred. In other words, the particular instance refers to instances in which,—(i) the right or custom was claimed, recognized, exercised or (ii) its existence was disputed, asserted or departed. It must be the instances prior to the present suit in question. It may be or may not be inter-parties.

Example: A plea of res judicata being an instance in the present suit is admissible. Documents produced in support of inter-parties suits viz., sale deeds, mortgage deeds, are admissible under this section.

On the other hand, judgments not inter-parties are also admissible under this section, although there is conflicting judgments, when right was claimed in subsequent suit. In a dispute as to succession to the office of a Mohunt, previous judgment is made admissible. In this case the present Mohunt had been successful to assert his right as a spiritual collateral of the former Mohunt. A judgment not inter-parties is admissible in proof of a transaction or a particular instance in which the relationship was asserted, recognized or denied.

Q. "All confessions are admissions but all admissions are not confessions" – Explain. Write down the evidentiary value of retracted confession.

The fundamental differences between confession and admission, are explained here in a detailed manner:

1. By the term confession, we mean a legal statement made by the accused in which he/she concedes the guilt of the offence. In contrast, admission means acceptance of truth or fact in issue or a material fact in a civil or criminal proceeding.

2. The confession is made in criminal proceedings only. On the other extreme, admission is related to both civil and criminal proceedings.

3. The confession must be made voluntarily, in order to become relevant. Conversely, the admission does not require voluntary expression so as to become material. However, it effects its weight.

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4. The confession made can be retracted easily, but once the admission is made, it cannot be retracted.

5. The confession is made by the person under indictment, i.e. accused. Unlike admission, wherein the admission is made by any person, who can be the agent or even a stranger.

6. Confession always goes against the person making it. On the contrary, admission is used on behalf of the person making it.

To sum up, it can be said that the admission has a wider scope than confession, as the latter comes under the ambit of the former. Hence, Every confession is an admission, but the reverse is not true.

The main difference between these two is that in case of confession, the conviction is based on the statement itself, however, in the case of admission, additional evidence is required, to support the conviction.

Probative value of confessions

A confession is substantive evidence against its maker, if it has been duly recorded and suffers from no legal infirmity, it would suffice to convict the accused who made the confession, though as a matter of prudence, the Court usually expects at least some corroboration before acting upon it. But before acting upon a confession, the Court must be satisfied that it is *voluntary* and *true*. Voluntariness depends upon whether there was any threat, inducement or promise. The truth is to be judged in the context of the entire prosecution case i.e. whether it fits into the proved facts and does not run counter to them. If these two conditions are satisfied, it becomes the most reliable piece of evidence against the *maker*.

Retracted Confessions

Retraction may be defined as the act of recanting. To recant means to withdraw or renounce prior statements formally. A retracted confession is one which is withdrawn or retracted later on by the person making it.

Retraction of statements is something that happens in most criminal cases. The reason behind the same may be the inadequate police protection or the ill-developed mechanism for witness protection or the inherent securities of the witnesses or the accused under the influence of the status of the opposing party as happens in almost all the high profile cases.

It should be noted here that the Act makes no distinction whatsoever between a retracted confession and an unretracted confession and both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession. ***Re: Kodur Thimma Reddi and Ors, AIR 1957 AP 758***

Right to Retract Confessions

Retraction of a confession is very common since it is often procured through non-validating means An extraordinarily large number of confessions, in criminal cases, culminate in retractions, as a matter of course. ***[Queen Empress v. Babulal, (1884) ILR 6 All 509]*** In India, retractions are as plentiful as confessions. ***[R v. Thompson, [1893] 2 QB 12]*** This goes to show that most confessions do no proceed from a feeling of penitence and remorse as they should, but that they have their source in the inducement, threat, torture, hope or any other non-validating cause. ***[The Deputy Legal Remembrancer v. Karuna Baistobi(1895) ILR 22 Cal 164]*** Thus, to retract from a confession is the right of the confessor and all the accused have invariably adopted that right. ***[Rajen Boro v. State of Assam, 2003 (2) GLT 632]***

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Concept of Retraction flows from the Constitutional Right against Self-Incrimination

Article 20(3) of the Constitution of India, 1950 guarantees protection against the compulsion to be a witness against oneself. The application of this provision extends to statements made during police interrogations. This means that no person can be forced to make a confession, against his will. Thus, the test of relevancy of a confession is whether it is voluntary or not. Since there is a danger that the confessor may implicate himself against his will, the law regarding the same is so strict that a confession that is not voluntary is rejected even if it is true. Sections 24 to 30 of the Evidence Act have been legislated to take care of this constitutional right by excluding from evidence all self-incriminating statements that have not been made voluntarily. A right to retract is important because a retraction puts the court on enquiry as to the voluntary character of the confession. Moreover, to withdraw from what has been said previously is to be interpreted as an extension of civil liberty.

Retraction must be affected, especially when the Confession is Involuntary

When a confession has been retracted, the court has a duty to evaluate the evidence concerning the confession by looking at all aspects. The first test that the court is required to apply with regard the same is to ascertain whether the confession was voluntary or not. Satisfaction of this test is a *sine qua non* for admissibility of the confession in evidence. The word 'voluntary' used in respect of a confession refers to a confession that is not caused by inducement, threat or promise. If it appears to the court that a confession has been procured using any inducement, then it would be rendered irrelevant. A well-grounded suspicion based on the circumstances of the case may exclude a confession since the use of the word 'appears' in Section 24 suggests a lesser degree of probability than 'proof' defined in Section 3 of the Evidence Act. It is idle to expect the accused to 'prove' the inducement for in most cases such proof cannot be available. In light of the same, anything from the barest suspicion to positive evidence is considered sufficient for discarding a confession.

Evidentiary value of Retracted Confessions

Status of retracted confessions under the Act: The Act makes no distinction whatsoever between a retracted confession and an unretracted confession and both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession. ***(Re: Kodur Thimma Reddi and Ors, AIR 1957 AP 758)***

Particulars of a retracted confession: As the confession is required to be clear, specific and unambiguous, its retraction should also not be ambiguous, vague or imaginary. The person alleging retraction of confession or his earlier inculpatory statement must satisfy the court that that he had withdrawn from his statement at the earliest possible time and without any afterthought or advice and must give reasons for the same.

Weight attached to a retracted confession: The weight to be attached to a retracted confession must depend on the circumstances under which the confession was given, and the circumstances under which it was retracted including the reasons given for retraction.

Importance of corroboration: It is only as a matter of prudence and caution which has sanctioned itself into a rule of law that retracted confession cannot be made the sole basis of conviction unless it is corroborated. It is not necessary that each and every circumstance mentioned in the confession is separately and independently corroborated. It would be sufficient if the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession i.e. corroborated in general particulars.

It is also a general rule that it is unsafe to base the conviction of the accused upon his retracted confession even when it is held to be true and voluntary unless it is corroborated in material particulars by independent evidence.

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Value of retracted confession against Co-accused and Accomplice: Where more persons than one are being tried jointly for the same offence, a confession made by any one of his co-accused can be taken into consideration by the court not only against the maker but also against his co-accused. The Act nowhere provides that if a confession is retracted, it cannot be taken into consideration against the co-accused or the confession accused. A retracted confession can be considered against but it cannot be the basis for conviction of co-accused.

However, the standard of corroboration is quite different in such cases. In the case where the resiled statement is being used against the confessing accused, general corroboration is sufficient whereas in cases of co-accused or an accomplice, corroboration in material particulars in necessary.

It should be noted that it has been held that a retracted confession can be taken into consideration to indicate the prima facie involvement of others.

Comparison with English Law

It is submitted that the Law in England differs from that in India to the extent that an accused person can be convicted on his own confession, even when it is retracted if the Court is satisfied with its truth. In India, there is a further requirement of corroborative evidence to support it.

Conclusion: In conclusion, it is submitted that retraction is a very important principle of the Law of Evidence. It has a strong practical foundation. Furthermore, to give a gist of this article, the following principles constitute the law relating to retracted confessions:

1. It is not illegal to base a conviction upon the uncorroborated confession of an accused person, provided that the court is satisfied that the confession was voluntary and true in fact.

2. From the viewpoint of legality, the fact that a confession has been retracted is immaterial,

3. A confession is not regarded as involuntary merely because it has been retracted.

4. Before using the retracted confession, it must be proved to be true and voluntary.

5. In cases of co-accused, the confession must be corroborated by material particulars.

6. A person has a general right of retraction which flows from the principle against self-incrimination.

Q. Discuss the importance of "Expert opinion" in Indian Evidence Act. Distinguish between evidence of expert witness and ordinary witness.

The courts have been accustomed to act on the opinion of experts from the early time. The reason is obvious. There are many matters which require professional or specialised knowledge which the court may not possess and me, therefore, rely on those who possess it. In ***Folokes v. Chadd, [(1782) 3 Dough KB 157],*** Bank was erected for the purpose of preventing the sea overflowing certain meadows and the question arose weather is contributed to the choking and decay of a harbour. A celebrated engineer was allowed to express his opinion on the matter. Lord Mansfield, C.J., proceeded as follows :

Mr. Smeaton (the engineer) is called. It is objected that Mr Smeaton is going to speak not as to facts but as to opinion and that opinion, however, is deducted from facts which are not disputed so the situation of banks, the course of

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Tides, and of winds and the shifting of sons and his opinion deduced from all these factors that mathematically speaking, the bank may contribute to the Mischief but not sensibly Mr Smeaton understands the construction of harbours, the causes of the destruction and how remedied. In matters of science, no other witness can be called. Chief Justice quoted "I cannot believe that where the question is whether a defect arises from a natural or an artificial cause the opponents of men of Science and not received. Handwriting is proved every day by opinion and for false evidence on such question a man may be inducted for perjury."

WHO IS AN EXPERT?

The section permits only the opinion of an expert to be cited in evidence. This requires determination of the question as to who is an expert. The only guidance in the section is that he should be a person, especially skilled on the matter. Does the only definition of an expert available in the act is that he is a person especially skilled in the subject on which he testifies? But the section does not refer to any particular attainment standard of study or experience which would qualify a person to give evidence as an expert. Generally, the witness is considered as an expert if he is skilled in any particular art, trade or profession and possessed of particular knowledge concerning the same. It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be an expert.

In ***Forest Range Officer v. P. Mohammad Ali*****, [1994 AIR 120]**, it was held that expert opinion is only the opinion evidence. It does not help the court in interpretation. The main opinion of an expert cannot overwrite the positive evidence of the attesting witness. Expert opinion is not necessarily binding on the court.

Section 45 – Opinions of Experts: When the court has to form an opinion upon a point of foreign law or of science or art or has to identify of handwriting of finger Impressions, the opinions upon that point of persons specially skilled in such foreign Law, Science or art or in questions as to identify of handwriting or finger impression are relevant facts. Such persons are called Experts.

Subjects on which experts can testify: The subjects on which an expert is competent to testify are mentioned in the section itself and they are foreign law, matters of science, questions of art, identify of handwriting or of finger Impressions.

Foreign Law: Foreign law means any law which is not in force in India the courts of the country may not be in a position to appreciate the principles of a foreign law and therefore whenever a Court has to decide a question of foreign law the court can seek the help of those who are experts on the particular foreign law. In England, it can be proved by leading expert evidence.

Science or Art: Expert opinion is relevant to all questions on points of science or art. Science or art includes all subjects on which a course of special study or experience is necessary to the formation of an opinion. Field has quoted "These words are to be broadly construed, the term science not being limited to higher Sciences and the term art not being limited to fine arts but having its original sense of handicraft trade profession and skill in work which with the advance of culture has been carried beyond the sphere of the common purpose of life into that of artistic and scientific action." To determine whether a particular matter is of a scientific nature or not the test to be applied is whether the subject matter of enquiry is such that experienced persons are unlikely to prove capable of forming a correct judgement without the assistance of experts.

Handwriting and Finger Impressions: Under section 45 of the Indian Evidence Act, an expert can depose to the identity of handwriting between the questioned document and the document admitted or proved. A disputed handwriting may be proved either by calling an expert or by examining a person acquainted with the handwriting of the person by whom the questions document is alleged to have been written or a comparison of the two under

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section 73. When the court has to decide upon the identity of the handwriting of a certain person or The Identity of a certain person's finger impression the court may receive the evidence of a person who has acquired an expertise on the matter. About from persons possessing professional qualification on the subject the court may receive the evidence of a person who is otherwise acquainted with the subject. In ***R v. Silverlock*****, 1894 2 QB 766,** the court observed that a solicitor might be treated as an expert in handwriting even if he had acquired his knowledge as an amateur. as to the reliability of such evidence the Supreme Court has laid down and quite a few cases that the evidence of an expert as to handwriting is only in the nature of an opinion and can rarely take the place of substantive evidence. It should be corroborated either by clear direct evidence or by circumstantial evidence.

In the case of ***State of Maharashtra v. Sukhdeo Singh,*** **1992 AIR 2100,** the Apex Court opined that before a Court can act on the opinion evidence of a handwriting expert two things must be proved beyond any manner of doubt, namely, (i) the genuineness of the specimen/admitted handwriting of the concerned accused and (ii) the handwriting expert is a competent, reliable and dependable witness whose evidence inspires confidence.

The opinion of thumb impression expert is entitled to greater weightage than that of a handwriting expert.

In **R v Oakley, (1979) Crim LR 657 CA**, a police officer who had attended a course, passed an exam as an accident investigator and attended more than 400 accidents was entitled to give expert evidence as to the cause of an accident.

The Supreme Court in the case of ***State of H.P. v. Jai Lal and Ors.,(1999) 7 SCC 280,*** *e*xplained the substance of expert opinion by stating that Section 45 of the Evidence Act which makes opinion of experts admissible lays down, that, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

Value of Expert Opinion: The weight that ought to be attached to the opinion of an expert is a different matter from its relevancy. the act only provides about the relevancy of expert opinion but gives no guidance as to its value and store the value of Expert Opinion has to be viewed in the light of many adverse factors. Firstly there is the danger of error or deliberate falsehood. these privileged persons might be half blind, incompetent or even corrupt. Secondly is evidence after your opinion and human judgement is fallible. Human knowledge is limited and imperfect. No man ever mastered all the knowledge on any of the Sciences. Thirdly it must be borne in mind that an expert witness however impartial he may wish to be is likely to be unconsciously predicted in favour of the side which calls him. it is on the basis of these factors that it has been removed of an expert that the witnesses now in worst repute are called expert witnesses that is witnesses retained and page to support by their evidence a certain view on a scientific or technical question.

Difference Between an Expert Witness and a Regular Witness

In a court trial, to appropriately gather evidence and relevant opinions, both factual witnesses and expert witnesses will be called to testify. Although both entities offer relevant information to the case, there are fundamental differences between the two types of witnesses.

The factual witness is an individual who is knowledgeable towards the facts of the case through a direct participation or observation of the intricacies involved. For example in a murder case, a factual witness would be an observer of

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the actual murder or an acquaintance of the individuals involved in the case. The factual witness simply delivers truthful statements regarding the character of those involved or an account of what they saw take place.

In contrast, an expert witness is an individual who holds a specialized knowledge in a particular educational field concerning the case. For example, an expert witness can be a doctor who is well-versed in a particular field of medicine. As an expert witness the individual will use his or her advanced knowledge of a particular subject to elucidate on a piece of information regarding the trial to facilitate an appropriate verdict.

Q. Discuss the relevancy and future of Electronic Evidence.

Electronic evidence has lately become the most important evidence. Information Technology has caused a paradigm shift in the way individuals and organizations communicate, create, collect, share and store data and information. With the help of mobile phones, people are daily documenting their lives which results in an expansive collection of records that may become 'evidence' in the forthcoming cases. Electronic documents include photographs, video, audio, comments, emails, and different other social media records. This has enhanced the way things proceed in the court and with this, the traditional way of eyewitness testimony is highly corroborated with this digital/ electronic evidence.

The Section 65A and 65B have been added to the Indian Evidence Act, 1872 by the Information Technology Act, 2000. The Government of India enacted its Information Technology Act 2000 with the objectives stating officially as: *"to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto."* The main aim of the said legislation was to provide legal recognition to electronic documents, electronic signatures, other offences and contraventions and dispensation of justice for cyber crimes.

Justice P.N Bhagwati held in the case of **National Textile Workers' Union v P.R. Ramakrishnan (1983) 1 SCC 228**, held that "law cannot stand still and it must change with the changing social concepts and values. If the law fails to respond to the needs of changing society, then it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth." Therefore, the changing circumstances today where virtually every crime has an electronic component has had a considerable effect in the law of the land and to respond to the current needs the laws have been amended to cater or facilitate its larger goals i.e dispensation of justice.

The trend of changing laws relating to evidence can be seen, for example in the case, **State v S.J. Choudhary (1996) 4 SCC 567**, It was held that the Evidence Act was an ongoing Act and the word "handwriting" in Section 45 of that Act was construed to include "typewriting" and on the same principle, courts have interpreted, over a period of time, various terms and phrases. For example, "telegraph" to include "telephone"; "banker's books" to include "microfilm"; "to take note" to include "use of tape recorder"; "documents" to include "computer databases".

Types of Evidence Under Indian Evidence Act, 1872: The law of evidence has long been guided by the rule of "best evidence" which is considered to have two basic paradigms – avoidance of hearsay and production of primary evidence. Considering this statement, it is clear that evidence has been classified under two heads i.e Primary Evidence (Section 62 of Indian Evidence Act) and Secondary Evidence (Section 63 of Indian Evidence Act).

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Primary evidence means the original document being itself produced for inspection by the court. A document has been defined as any matter which has expressed or described upon any substance by means of letters, marks or figures for the purpose of recording that matter. Thus, a certificate of age, an inscription on a stone plaque, a caricature or photograph, a map, are all documents of various forms. If a copy is made of such a document, it will not be primary evidence since it is not the original. Copies of the original document are considered secondary evidence. Secondary evidence is acceptable in court only under certain conditions, such as when the original is in the possession of the adversary or when the original is destroyed or lost, or when the original is of such a nature that it cannot be easily moved.

Section 65A & 65B: Section 65A lays down that the contents of electronic records may be proved in accordance with the provisions of Section 65B. Section 65B (Admissibility of electronic records) states that any information contained in electronic records which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be also deemed to be a document if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without any further proof or production of the original.

The conditions further laid down under Section 65 B are as follows:

- The information produced by the computer during the period over which the computer was used over a regular period of time to store or process information or for any other activity carried out regularly over that period of time by the person having lawful control over the use of the device.
- The said information was regularly fed into the computer in the ordinary course.
- The computer must operate properly during that period of time when the information was being stored and if not working properly then the same must not have any effect on the electronic record thus stored.
- The information contained in the electronic record thus reproduced must be of the nature of such kind that it was fed into the computer in the ordinary course of nature.

Therefore in simple words, Section 65B provides that electronic records shall be considered documents, thereby making it primary evidence, if it satisfies the conditions mentioned above. It further provides that all computer output shall be considered as being produced by the computer itself, whether it was produced directly or indirectly, whether with human intervention or without. This provision does away with the concept of computer evidence being hearsay. As a computer output is a deemed document for the purpose of proof. Further, Section 65B (3) maintains that where, over any period of time, the information was processed or fed into the computer on interlinked computers or one computer after the other in succession all the computers so used shall be treated as one single computer.

A "computer" has been defined in the clause (i) of Section 2(1) of the IT Act and it states that, "computer means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network." In the case, **Syed Asifuddin v. The State of Andhra Pradesh 2006 (1) ALD Cri 96, 2005 CriLJ** 4314 decided on 29th July, 2005 by the AP High Court wherein it was stated that when seen the definition of a "computer" in the light of clause (i) of Section 2(1) of IT Act, it is clear that a cell phone is a computer which is programmed to do among others the function of receiving digital audio signals, convert it into analog audio signal and also send analog audio signals in a digital form externally by wireless technology.

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The Changing Scenario About Video-Conferencing: In **Basavraj R. Patil Vs. State of Karnataka (2000) 8 SCC 740**, the question was whether an accused needs to be physically present in the court to answer the question put to him by court whilst recording his statement under Section 313, Cr.P.C. It was held that the section has to be considered in the light of revolutionary changes in the technology of communication and transmission and the marked improvement in facilities for legal aid in the country. It was not necessary that in all the cases it is necessary for the accused to be present in the court physician to answer the questions put forth by the court. In the said judgment itself, the court observed that video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. This court said is not virtual reality but actual reality. The decision of the court was that, under Section 3 of the Indian Evidence Act, evidence can be both oral and documentary and electronic records can be produced as evidence. This means that the evidence, even in criminal matters, can also be by way of electronic records. This would include video conferencing.

One of the firsts of its kind, in the landmark judgment (State of Maharashtra Vs. Praful B. Desai (2003) 4 SCC 601) where the court answered the question as to whether in a criminal trial, evidence can be recorded via 'video conferencing'. The Supreme Court cited the infamous judgment of the US Supreme Court (**Maryland v Santra Aun Craig [497 US 836 (1990**)]) where it was held that the recording of evidence by video-conferencing was not a violation of the confrontation clause. It was held that video-conferencing could be resorted to for the purpose of taking evidence of a witness. In this case, one party was seeking directions of the court to take evidence of a witness residing in the USA. The SC stated that such recording of evidence satisfies Section 273 of the Code of Civil Procedure that evidence is recorded in the presence of the accused. In explaining the benefits of videoconferencing the court observed that "In fact, the Accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Courtroom. They can observe his/her demeanour. In fact, the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness."

Section 65B(4) [Admissibility of Electronic Evidence]: Section 65B (4) talks about a certificate identifying the electronic records containing the statement and describing the manner in which it was produced by a computer and satisfying the conditions mentioned above and signed by a person occupying a responsible official position in relation to the operation of the relevant device or management of its relevant activities, shall be the evidence, of any matter stated in the certificate, it shall be sufficient for the matter to be stated to the best of the knowledge and belief of the person stating.

In **State v. Navjyot Sandhu (2005) 11 SCC 600,** the Supreme Court held that merely because a certificate containing the details in sub-section (4) of Section 65B is not filed in the instant case, does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Section 63 and 65 i.e no bar in adducing secondary evidence of an electronic record under the said section (63 & 65). This was overruled by the judgment in **Anvar P.V. v. P.K. Basheer and Others (2014) 10 SCC 473**, delivered by a Three-Judge Bench, it was observed that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

In a very recent judgment, the Supreme Court of India clarified its position relating to this law i.e **Shafi Mohammad Vs. The State of Himachal Pradesh SLP (Crl.) No. 2302 of 2017,** has rationalized the law relating to the admissibility of the electronic evidence particularly in the view of the provision of Sec 65B of the Indian Evidence Act. Section 54-A of the Cr.P.C. provides for videography of the identification process and the proviso to Section 164(1) Cr.P.C. provide for audio-video recording of confession or statement under the said provision. It was held that Section 65B

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(4) of the Indian Evidence Act, is a procedural provision intended to supplement the law and if the electronic evidence is "authentic and relevant" the same can certainly be admitted, subject to the satisfaction of the court and it may depend on situation such as "whether the person producing such evidence is in a position to furnish certificate" under Section 65B (4). In simple word, if a person is not in a position to produce such certificate signed by a person occupying a responsible position in relation to the operation of the relevant device or management of the relevant activities, in such situation Section 65B (4) should not be applied as, it will be a denial of justice. The requirement of a certificate is not always mandatory.

The Supreme Court also clarified the legal position on the subject on the admissibility of the electronic evidence, holding that a party who is not in possession of device from which the document is produced, such party cannot be required to produce a certificate under Section 65B (4) of the Indian Evidence Act.

Transcription of Recorded Conversation: In **Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke MANU/ SC/ 0040/ 2015**, relying upon the judgement of Anvar P.V. supra, while considering the admissibility of transcription of recorded conversation in a case where the recording has been translated, the Supreme Court held that as the voice recorder had itself not subjected to analysis, there is no point in placing reliance on the translated version. Without a source, there is no authenticity for the translation and it was held that 'source' and 'authenticity' are the two key factors for electronic evidence.

The Future of Electronic Evidence: The courts have by and large maintained that for the evidence to be admissible, it must be authenticated. The foundations for digital evidence are based on established principles of authentication and admissibility that originated with the use of "paper" evidence. The five separate foundations are, relevance, authenticity, hearsay, best evidence, the probative value must outweigh any prejudicial effect. The nature of digital evidence has been changing over time as digital information now can be created easily and without any verifiable record of who did so and also has the scope of changes without detection. There has also been reliance on corroboration of this electronic evidence through a combination of witness testimony or documentary physical evidence to determine the accuracy of the same. The budding area of development under the Indian Criminal Law system is the area of digital forensics which has been successful in supplementing the electronic evidence with recovery and investigation of material found in digital devices.

In India, all electronic records are now considered to be documents, thus making them primary evidence. The admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent judgment of the Apex Court and various other High Courts as discussed above. These changes in the stance of the law have created paradigm shifts in the admissibility and relevancy of electronic evidence, albeit certain precautions still being necessary. However, technology has itself provided answers to problems raised by it, and computer forensics ensure that manipulations in electronic evidence show up clearly in the record. However, there are a few gaps still unresolved but this area of law (Electronic Evidence) is yet to see more changes with upcoming events and technological changes.

Q. Discuss in brief the revolutionary changes made by the Information Technology Act 2000 and mention its effects on the Indian Evidence Act

Due to enormous growth in e-governance throughout the Public & Private Sector, Electronic Evidence have involved into a fundamental pillar of communication, processing and documentation. These various forms of electronic evidence are increasingly being used in both Civil & Criminal Litigations. During trials, Judges are often asked to rule on the admissibility of electronic evidence and it substantially impacts the outcome of civil law suit or

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conviction/acquittal of the accused. The Court continue to grapple with this new electronic frontier as the unique nature of e-evidence, as well as the ease with which it can be fabricated or falsified, creates hurdle to admissibility not faced with the other evidences. The various categories of electronic evidence such as website data, social network communication, e-mail, SMS/MMS and computer generated documents poses unique problem and challenges for proper authentication and subject to a different set of views.

The Indian Evidence Act has been amended by virtue of Section 92 of Information Technology Act, 2000 (Before amendment). Section 3 of the Act was amended and the phrase "*All documents produced for the inspection of the Court*" were substituted by "*All documents including electronic records produced for the inspection of the Court*". Regarding the documentary evidence, in Section 59, for the words "Content of documents" the words "Content of documents or electronic records" have been substituted and Section 65A & 65B were inserted to incorporate the admissibility of electronic evidence.

In Section 61 to 65, the word "Document or content of documents" have not been replaced by the word "Electronic documents or content of electronic documents". Thus, the intention of the legislature is explicitly clear i.e. not to extend the applicability of section 61 to 65 to the electronic record. It is the cardinal principle of interpretation that if the legislature has omitted to use any word, the presumption is that the omission is intentional. It is well settled that the Legislature does not use any word unnecessarily. In this regard, the Apex Court in **Utkal Contractors & Joinery Pvt. Ltd. v. State of Orissa** held that *"…Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily*."

On the other hand, in Section 61 to 65 Indian Evidence Act, the word "Document or content of documents" have not been replaced by the word "Electronic documents or content of electronic documents". Thus, the omission of the word, *"Electronic Records"* in the scheme of Section 61 to 65 signifies the clear and explicit legislative intention, i.e. not to extend the applicability of Section 61 to 65 to the electronic record in view of overriding provision of Section 65-B Indian Evidence Act dealing exclusively with the admissibility of the electronic record which in view of the compelling technological reasons can be admitted only in the manner specified under Section 65-B Indian Evidence Act.

The main objective to introduce the specific provision has its origin to the technical nature of the evidence particularly as the evidence in the electronic form cannot be produced in the court of law owing to the size of computer/server, residing in the machine language and thus, requiring the interpreter to read the same. The Section 65B of the Evidence Act makes the secondary copy in the form of computer output comprising of printout or the data copied on electronic/magnetic media. It provides:-

Section 65B – Admissibility of Electronic Records

Sec. 65B (1): Notwithstanding anything contained in this Act, any information contained in an electronic record –

- which is printed on a paper, stored, recorded or
- copied in optical or magnetic media
- produced by a computer
- shall be deemed to be also a document, if the conditions mentioned in this section are satisfied

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- in relation to the information and
- computer in question and
- shall be admissible in any proceedings, without further proof or production of the original,
- as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Sec. 65B (2):

The **computer** from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used;

- **Information** was fed in computer in the ordinary course of the activities of the person having lawful control over the computer;
- The **computer** was operating properly, and if not, was not such as to affect the electronic record or its accuracy;
- **Information** reproduced is such as is fed into computer in the ordinary course of activity.

Sec.65B (3):

The following computers shall constitute as single computer-

- by a combination of computers operating over that period; or
- by different computers operating in succession over that period; or
- by different combinations of computers operating in succession over that period; or
- in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

Sec. 65B (4):

Regarding the person who can issue the certificate and contents of certificate, it provides the certificate doing any of the following things:

- identifying the electronic record containing the statement and describing the manner in which it was produced;
- giving the particulars of device
- dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any

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matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

This contention is further strengthened by the insertion of Section 65A & 65B and the words "Notwithstanding anything contained in this Act" which is a non-obstante clause, further fortifies the fact that the legislature has intended the production or exhibition of the electronic records by Section 65A & 65B only. A non-obstante clause is generally appended to a Section with a view to give the enacting part of the Section, in case of conflict, an overriding effect over the provision in the same or other act mentioned in the non-obstante clause. It is equivalent to saying that despite of the provisions or act mentioned in the non-obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs.[2]

The aforesaid principles of interpretation with respect to the non-obstante clause in form of "Notwithstanding anything contained in this Act" is further supported by the Hon'ble Apex Court in **Union of India and Anr., v. G.M. Kokil and Ors**. observed "*It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions."* Further, the Hon'ble Apex Court in the case cited as **Chandavarkar Sita Ratna Rao v. Ashalata S. Guram,** explained the scope of non-obstante clause as "…*It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation…*"

ANVAR P.V. VERSUS , P.K. BASHEER AND OTHERS

In this significant judgment, the Supreme Court has settled the controversies arising from the various conflicting judgments as well as the practices being followed in the various High Courts and the Trial Courts as to the admissibility of the Electronic Evidences. The Court has interpreted the Section 22A, 45A, 59, 65A & 65B of the Evidence Act and held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate U/s 65 B(4) of Evidence Act. It has been elucidated that electronic evidence without certificate U/s 65B cannot be proved by oral evidence and also the opinion of the expert U/s 45A Evidence Act cannot be resorted to make such electronic evidence admissible.

The judgment would have serious implications in all the cases where the prosecution relies on the electronic data and particularly in the cases of anticorruption where the reliance is being placed on the audio-video recordings which are being forwarded in the form of CD/DVD to the Court. In all such cases, where the CD/DVD are being forwarded without a certificate U/s 65B Evidence Act, such CD/DVD are not admissible in evidence and further expert opinion as to their genuineness cannot be looked into by the Court as evident from the Supreme Court Judgment. It was further observed that all these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic records sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

In the anticorruption cases launched by the CBI and anticorruption/Vigilance agencies of the State, even the original recording which are recorded either in Digital Voice Recorders/mobile phones are not been preserved and thus, once the original recording is destroyed, there cannot be any question of issuing the certificate under Section 65B(4) of the Evidence Act. Therefore in such cases, neither CD/DVD containing such recordings are admissible and cannot be exhibited into evidence nor the oral testimony or expert opinion is admissible and as such, the recording/data in the CD/DVD's cannot become a sole basis for the conviction.

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In the aforesaid Judgment, the Court has held that Section 65B of the Evidence Act being a 'not obstante clause' would override the general law on secondary evidence under Section 63 and 65 of the Evidence Act. The Section 63 and Section 65 of the Evidence Act have no application to the secondary evidence of the electronic evidence and same shall be wholly governed by the Section 65A and 65B of the Evidence Act. The Constitution Bench of the Supreme Court overruled the judgment laid down in the **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru [(2005) 11 SCC 600]** by the two judge Bench of the Supreme Court. The court specifically observed that the Judgment of Navjot Sandhu supra, to the extent, the statement of the law on admissibility of electronic evidence pertaining to electronic record of this Court, does not lay down correct position and required to be overruled.

The only options to prove the electronic record/evidence is by producing the original electronic media as Primary Evidence court or it's copy by way secondary evidence U/s 65A/65B of Evidence Act. Thus, in the case of CD, DVD, Memory Card etc. containing secondary evidence, the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

Other Important Judgments

Relying upon the judgment of Anvar P.V. supra, while considering the admissibility of transcription of recorded conversation in a case where the recording has been translated, the Supreme Court held that as the voice recorder had itself not subjected to analysis, there is no point in placing reliance on the translated version. Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for electronic evidence. **Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke**

The Hon'ble High Court of Delhi, while deciding the charges against accused in a corruption case observed that since audio and video CDs in question are clearly inadmissible in evidence, therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with coaccused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question. **Ankur Chawla Vs. CBI**

The Hon'ble High Court of Calcutta while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of Section 65B r/w Section 88A of Evidence Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication. **Abdul Rahaman Kunji Vs. The State of West Bengal**

In the recent judgment pronounced by Hon'ble High Court of Delhi, while dealing with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate u/s 65B Evidence Act, the court observed that the secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever. **Jagdeo Singh Vs. The State and Ors.**

Conclusion: The admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent judgment of the Apex Court and various other High Courts as discussed above. The proposition is clear and explicit that if the secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the deposition of the witness in the court of law cannot be looked into by the court. However, there are few gaps which are still unresolved as what would be the fate of the secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act cannot be taken and the accused cannot be made witness against himself as it would be violative of the Article 19 of the Constitution of India.

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Q. Discuss the facts of which the Court must take judicial notice. "Facts judicially noticeable need not be proved"- Explain.

Section 56 to 58 of the Indian Evidence Act, 1872 lays down provision relating to facts which need not be proved. Here are the facts which should not be proved in any court of law.

1. Facts Judicially Noticeable Need Not Be Proved (Section- 56)

Section 56 declares that "no fact of which the court will take judicial notice need be proved". Thus, if the court is bound to take notice of a particular fact the parties are spared of the burden of proving that fact. For example, the court is bound to know the law of the land.

In **Managing Committee of Raja Sidheshwar High School v. State of Bihar (AIR 1996 Pat. 19.)**, it was held that the court can take judicial notice of the fact that the system of education in the State has virtually crumbled and serious allegations are made frequently about the manner in which the system is being worked.

2. Facts Of Which Court Must Take Judicial Notice (Section- 57)

Introduction: The Provision is supplemented by two declarations at the end of the section. One of them says that in all these matters, and also on matters of public history, literature, science or art, the court may consult the appropriate books or documents of reference. The second declaration is that if a party calls upon the court to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as the court may consider necessary to enable it to take judicial notice. It means that the party who desires the court to take judicial notice of a fact has to produce before the court the reference material. Where, for example, a party request the court to take judicial notice of the proceedings of the legislatures, he should produce before the court the journal of those bodies, or their published acts or abstracts, or copies purported to be printed by order of the government concerned. In other words, the source material in which the judicially noticeable fact is recorded will have to be produced before the court.

The only guiding principle, apart from statute, as to judicial notice which emerges from the various recorded cases, appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court notices it either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.

The basic essential is that the fact is to be of a class that is so generally known to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what is not 'general' but 'particular' facts.

Constitutional, Political and Administrative Matters: Judicial notice of a fact means that the court is supposed to have knowledge of the fact and the judge may rely upon his personal knowledge for deciding the case though it is not evidence in the real sense. Thus, where a judge recognized the signature of the minister for defence saying that he knew the Minister and had seen his signature as such Minister on many papers which came to him.

Law, Regulations and General Customs: The Courts may also take notice of regulations, bye-laws and other forms of sub-legislation. "Regulation made under the Act became part of the law and a tribunal takes judicial notice of the law, being at liberty to refresh memory by referring to the text of the regulations which, if there is any doubt about it, can be established by reference to a copy printed by the government printer. In **Union of India v. Nihar Kanta Sen**

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(AIR 1987 SC 1713), the Supreme Court has pointed out that the court should have taken judicial notice of the fact that a notification had been issued concerning the land of an intermediary.

The courts also take judicial notice of general customs. In **Jiwan Singh v. Des Raj (AIR 1982 Punj. [N.O.C] 306)**, it was held that when a general usage has been judicially ascertained and established, it becomes a part of the law merchant which courts of justice are bound to know and recognize.

Matters of common knowledge: The courts also take judicial notice of matters of common knowledge. For example, the courts take judicial notice of the meaning of ordinary terms being a matter of common knowledge, and evidence is not admissible to expound their meaning, through the court, in addition to suing its own knowledge, may refer to standard authors and authoritative dictionaries in order to obtain assistance in interpretation **[Camedan Marquis v. Inland Revenue Commissioners, (1914) 1 K.B. 641]**.

Judicial notice of the value of service of the housewife: A housewife died in a motor vehicle accident. The court said that judicial notice could be taken if services rendered by a housewife to her family. Rs. 1,500/- was taken to be the value of such services. The question of deducting 1/3 of the amount did not arise. Award of compensation of Rs. 2,95,000 was held to be proper (**United Indian Insurance Co. Ltd. v. Virambhai Ranchodbhai Patel, AIR 2007 Guj. 119.).**

Judicial notice, the fact of marriage in Army record: The fact of the marriage of an Army officer which was duly entered by the Army in its record was allowed to be tendered in evidence to prove the factum of marriage (**Ajay Singh v. Tikka Brijendra Singh, AIR 2007 H.P. 52).**

3. Facts Admitted Need Not Be Proved (Section- 58)

Another set of facts which need not be proved are facts which have been admitted. “Facts admitted need not be proved”. Section 58 lays down this principle. Averments made in a petition which have not been controverted by the respondent carry the effect of a fact admitted.

In **Thimmappa Rai v. Ramanna Rai, [(2007) 14 S.C.C. 63: (2007) CHN 144]**, an admission made by a party to a suit in an earlier proceeding is admissible against him in a subsequent suit also. Once a party to a suit makes an admission, it can be taken in an aid for determination of issues having regard to the provision of Section 58.

There are two systems of holding a trial, one is the inquisitorial system in which the judge also acts as an investigator of facts; he can neither advice any party nor ask for the production of any evidence. He gives his judgment on the basis of the contentions argues before him, that is to say, according to the issues between the parties. Facts which have been admitted on both sides are not an issue and, therefore, no proof needs to be offered of them.

The effect of admissions has already been noted before. It is that an admission does not constitute conclusive evidence of the fact admitted, though it may operate as an estoppel. Therefore, section 58 also provides that the court may in its discretion require some other proof of an admitted fact. But the discretion is that of the court. The section does not bar the court from acting on the admission itself and without requiring any further proof.

Q. Explain the rule relating Privileged Communication. Can a public officer be compelled to disclose communications made to him of official confidence?

The Indian Evidence Act mentions three kinds of communications as privileged from disclosure:

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1. Matrimonial communications;

2. Official communications; and

3. Professional communications.

1. Matrimonial Communications: A person cannot be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married; nor will such communication be permitted to be disclosed except in the following three cases, viz.,:—

(i) If the person who made it, or his or her representative in interest, consents; or

(ii) In suits between married persons; or

(iii) In proceedings in which one married person is prosecuted for any crime committed against the other. (Section 122)

2. Official communications: The provisions of the Act relating to official communications are contained in Sections. 123 and 124 of the Act, and can be discussed under the following two heads, viz.:

(a) Evidence as to affairs of State (Section 123)

(b) Disclosure of communications made in official confidence (Section 124)

(a) Evidence as to affairs of State (Section 123): Section 123 lays down that no one can be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who may give or withhold such permission as he thinks fit.

Under this section, the question whether the production of the document in question would be injurious to public interest is to be determined, not by the judge, but by the head of the department having custody of the document. **(Beatson v. Skene, 1860 L.J. Ex. 430)**

Commenting on this privilege, the Privy Council has remarked that the privilege regarding production of State papers is a narrow one, which must be exercised most sparingly. The principle and foundation of the rule is concern for public interest, and the rule cannot be applied any further than the attainment of the object requires. **(Henry Greer v. State, 1931 PC. 254)**

The Act does not lay down as to what documents are to be regarded as unpublished official records relating to affairs of State or communications made to an officer in his official capacity. It is not every official record or register or every official communication which can be regarded as privileged.

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on ground of public interest, must as a class be withheld from production.

The following are examples of unpublished records of State, viz.—

(a) Document exchanged between two States;

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(b) Document exchanged between the State and its own subjects; (c) Document exchanged between Heads of Department of another State;

(d) Document exchanged between Heads of Department or between Ministers.

(b) Disclosure of communications made in official confidence (Section 124): Under Section 124, no public officer can be compelled to disclose communications made to him in official confidence, if he considers that the public interest would suffer by the disclosure.

Section 124 lays down that a public officer cannot be compelled to disclose any communication made to him in confidence, if he considers that the public interest will suffer by such disclosure. This section is mainly confined to public officers. Any communication made to public officer in confidence is the essence of the section and its disclosure may lead to great public injury. Every citizen has a right to know how the State is functioning and why the State is withholding such information in such matters. The privilege extends only to communication upon the subject with respect to which the privilege extends, and the privilege can be claimed in exercise of the right or safeguard of the interest which creates the privilege.

Under this section it is court to decide the nature of communication made to public officers in confidence, whereas it is public officer to decide whether public interest would suffer in disclosure of such communication. Where examination of documents by the court satisfied that there was sufficient indication in communication and possible injury to the public interest if the document was allowed to be disclosed, privilege was allowed in respect of basic documents. It may be said that where there is apprehension of public injury the plea of privilege is legitimate and disclosure of documents is prohibited.

The question that arises under this section is whether the communication in question was made to the public officer in his official capacity. This is a condition precedent which must be satisfied before the privilege can be claimed, and this question is primarily to be decided by the Court before which the privilege is claimed.

Courts have adopted a basic principle for deciding whether a particular document is a communication made in official confidence to a public officer or not, namely, whether the document produced was under a process of law or not. If the former is the case, it would be difficult to say that the document produced under the process of law is a communication made in official confidence.

If, on the other hand, a document is produced in a confidential departmental enquiry, not under the process of law, but for gathering of information by the department for guiding them in future action, if any, which they have to take, it would be a case of communication made in official confidence.**(Killi Suryanarayana, 1954 Mad. 278)**

3. Professional communications: A professional communication means a confidential communication between a professional legal adviser and his client made to the former in the course, and for the purpose, of his employment as such advisor. The privilege attaching to confidential professional disclosures is confined to the case of legal advisers, and does not protect those made to clergymen, doctors, etc.

A professional legal adviser means a barrister, attorney, pleader or vakil. A client cannot be compelled, and a legal adviser cannot be allowed, without the express consent of his client, to disclose the oral or documentary communications passing between them in professional confidence (Section 126). Similarly, an interpreter, clerk or servant of such legal adviser cannot disclose such communication. (Section 127)

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The Bombay High Court has held that a salaried employee who advises his employer on legal matters is entitled to the same protection as other advisers like a barrister, attorney or pleader, under Sections 126 and 129 of the Act. Therefore, any communication made in confidence to him by his employer seeking his legal advice would be protected under Sections. 126 and 129, provided that such communication is not made in furtherance of any illegal purpose. ***(Municipal Corporation of Greater Bombay v. Vijay Metal Works, A.I.R. 1982 Bom. 6)***

Q. Explain and distinguish between "Primary Evidence" and "Secondary Evidence".

Primary Evidence: An authentic document or item that is offered as proof in a lawsuit, as contrasted with a copy of, or substitute for, the original. Primary evidence, more commonly known as best evidence, is the best available substantiation of the existence of an object because it is the actual item. It differs from secondary evidence, which is a copy of, or substitute for, the original. If primary evidence is available to a party, that person must offer it as evidence. When, however, primary evidence is unavailable—for example, through loss or destruction—through no fault of the party, he or she may present a reliable substitute for it, once its unavailability is sufficiently established.

Secondary Evidence: Secondary evidence is evidence that has been reproduced from an original document or substituted for an original item. For example, a photocopy of a document or photograph would be considered secondary evidence. Another example would be an exact replica of an engine part that was contained in a motor vehicle. If the engine part is not the very same engine part that was inside the motor vehicle involved in the case, it is considered secondary evidence.

Courts prefer original, or primary, evidence. They try to avoid using secondary evidence wherever possible. This approach is called the best evidence rule. Nevertheless, a court may allow a party to introduce secondary evidence in a number of situations. A duplicate is admissible unless a genuine question is raised as to its authenticity or unless it would be unfair to admit the duplicate in place of the original piece of evidence.

After hearing arguments by the parties, the court decides whether to admit secondary evidence after determining whether the evidence is in fact authentic or whether it would be unfair to admit the duplicate. However, when a party questions whether an asserted writing ever existed, or whether a writing, recording, or photograph is the original, the trier of fact makes the ultimate determination. The trier of fact is the judge if it is a bench trial; in a jury trial, the trier of fact is the jury.

Classifying evidence as either primary or secondary does not tell us anything about its accuracy or its ultimate value. This is especially true of secondary evidence. Thus it is always a good idea to ask the following questions:

1. How far removed from the original is it (when it is a copy)?

2. What was the reason for the creation of the source which contains this evidence?

3. Who was responsible for creating this secondary evidence and what interest did he have in its accuracy?

There are some situations where secondary evidence might be of even greater worth than primary evidence. These include those situations where the creator has carefully collected information from many sources (actually working with the primary evidence) into one place, such as a good family history.

Distinction between the Primary and Secondary Evidence.

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NO	PRIMARY EVIDENCE	SECONDARY EVIDENCE
1)	Primary Evidence is original document which is presented to the court for its inspection.	Secondary Evidence is the document which is not original document but those documents which are mentioned in Section.63.
2)	It is the main source of Evidence.	It is an alternative source of Evidence.
3)	Section 62 of the Evidence Act defines Primary Evidence	Section 63 of the Indian Evidence Act defines Secondary Evidence
4)	Primary Evidence is the best Evidence	Secondary Evidence is not best evidence but is evidence of secondary nature and is admitted in exceptional circumstances mentioned in Section 65.
5)	Giving Primary Evidence is general rule.	Giving Secondary Evidence is exception to the general rule.
6)	Primary Evidence itself is adm issible.	Secondary Evidence is admissible in the absence of the Primary Evidence.
7)	No notice required before giving Primary Evidence.	Notice is required to be given before giving Secondary Evidence.
8)	The value of Primary Evidence is highest.	The value of Secondary Evidence is not that of Primary Evidence

Q. Who is a hostile witness? Can a party cross examine his own witness? Discuss.

A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court. A witness who is gained over by the opposite party is a hostile witness. A witness is not to be considered hostile simply because he gives unfavorable answers. If a witness answers to certain is in direct conflict with the evidence of other prosecution witnesses; the Court should not on that ground allow the witness to be treated as hostile. He is hostile when his temper, attitude demeanor, etc.

In the witness Box show a distinctly hostile feeling towards the party calling him or when concealing his true sentiments he does not exhibit any hostile feeling but makes statements contrary to what he was called to prove and By his manner of giving evidence and conduct shows that he is not desirous of giving fairly and telling the truth to the court.

Cross-examination of one's own witness - The circumstances in which witness may be cross-examined by sender party calling him are laid down in section 154. Indian Evidence Act, which leaves the matter entirely to the discretion of the court.

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Section 154 says "the court may in its discretion, permit the person who calls a witness to put questions to him, which might be put in cross-examination by the adverse party."

A party us allowed to cross examine his own witness because the witness displays hostility and not necessarily because; he display untruthfulness. The fact that the witness is being cross examined does not imply an admission that all the witness statement are false . On the other hand, the main purpose of cross-examination is to obtain admission. The prosecution cannot put questions to its witness, which could only be allowed cross examination without first declaring the witness hostile and getting the court's permission to cross examination him. The Court has unfettered discretion to allow the prosecution to cross examine prosecution witness after declaring them hostile. The defiance may put leading questions in cross examination to a hostile witness to elicit fact in support of the defense theory. Where a witness makes statements against the interest of the party who has called him, is known as hostile witness. this makes it necessary that he should be cross examined by the very party who has called him so as to demolish his stand. this can be done with the permission of the court. Under Section 154 it is provided that the Court may discretion permit the party who has called a witness to put him such questions as could have been asked in cross examination.

The court held in ***St. Paul vs Delhi administration AIR 1976*** that the hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him an unfavorable witness is one called by the party to prove a particular fact , who fails to prove such fact or proves an opposite fact.

In this case officer was charged with taking bribe. A trap was laid by a Inspector of anti corruption department. the office of the accused was raided immediately. the evidence of the witness who participated in the trap (as also of Inspector ,was rejected because there were interested in a success of their trap. The other 2 (two) independent witnesses also made contradictory statement and the prosecution itself had cross examined them with d permission of the court.

The courts laid down in a number of cases that even when a witness is cross examined by the party who called him, his evidence cannot be treated as washed off from the record all together the Court can still rely upon that the part of witness who inspires confidence of credit.

Q. What is meant by presumption? Discuss the provisions regarding presumption as to documents?

Presumptions are inferences which are drawn by the court with respect to the existence of certain facts. When certain facts are presumed to be in existence the party in whose favor they are presumed to exist need not discharge the burden of proof with respect to it. This is an exception to the general rule that the party which alleges the existence of certain facts has the initial burden of proof but presumptions do away with this requirement.

Presumptions can be defined as an affirmative or negative inference drawn about the truth or falsehood of a fact by using a process of probable reasoning from what is taken to be granted. A presumption is said to operate where certain fact are taken to be in existence even there is no complete proof. A presumption is a rule where if one fact which is known as the primary fact is proved by a party then another fact which is known as the presumed fact is taken as proved if there is no contrary evidence of the same. It is a standard practice where certain facts are treated in a uniform manner with regard to their effect as proof of certain other facts. It is an inference drawn from facts which are known and proved. Presumption is a rule which is used by judges and courts to draw inference from a particular fact or evidence unless such an inference is said to be disproved.

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Presumptions as to Document

Section 79: This section states that the court shall presume a document to be genuine if it is a certificate or a certified copy. Also, any document, which is by law, declared to be admissible as evidence and has been certified by an officer of the central or the state government or of Jammu and Kashmir and is authorized by the centre. Provided, that the document is executed in the form as prescribed by the law.

Section 80: This section states that when a person has appeared before a court and has recorded a testimony or confession and his statement being relevant in another case, a certified copy is produced; the court shall presume it to be genuine.

Section 81: Under this section, official gazettes, newspapers or journals and copies of the acts of parliament are presumed to be genuine. In **State of Rajasthan v UoI (1977, 3 SCC 592),** the Supreme Court held that news reports do not constitute admissible evidence of their truth.

Section 81A: The court presumes the genuineness of any electronic record purporting to be the official gazette or any other record directed by law to be kept by any person, in a prescribed form and which is produced from proper custody.

Section 82: When any document is admissible by any court of England or Ireland for any particular purpose without proving the sign or stamp or seal authenticating it, the same is admissible for the same purpose, in India and is deemed to be genuine.

Section 83: The Court presumes that map or plans purporting to be made by the Central or any State Government, are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Section 84: The court presumes every book published or printed under the authority of the government of any country to be genuine which lay down the laws of that country or the reports of the decisions of the court of such country.

Section 85: A power of attorney, executed and authorized by a Notary, or any court, Judge Magistrate, Indian Consul or Vice Consul, or representative of the Central Government is presumed to be genuine.

Section 85A: The court shall presume that every electronic agreement concluded by affixing electronic signatures of the parties shall be genuine.

Section 85B: The court presumes electronic records to be genuine and electronic signatures to be made by the subscriber with the intention of approving electronic record until the contrary is provided.

Section 85C: The court presumes that the information listed in an electronic signature certificate is correct, except for the subscriber information, if the certificate was accepted by the subscriber.

Section 86: In this section, the court is given a judicial discretion to presume that certified copies of foreign judicial records are genuine.

Section 87: The court may presume that the information provided through books, or maps or charts to prove some fact in issue is genuine and is written or made by the author so named and published by the publication so mentioned.

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Section 88: This section is a presumption as to the telegraphic message. The court may presume that the message sent to the post office was the message forwarded through telegram and it was received by the person who was purported to receive it.

Section 88A: The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee corresponds with the message as fed into his computer for transmission. In both, section 88 & 88A, the court cannot make a presumption as to the person by whom such message was delivered.

Section 89: It is a compulsory presumption on behalf of the court that a document called for and not produced after a notice for production, was attested, stamped and executed in the manner required by the law.

Section 90: The court may presume a document, which is thirty years old and is produced from custody which appears to be proper to be genuine. The date on the evidence is the prima facie evidence of its age and the parties are not required to prove the age of the evidence **(Anderson v Weston, 1840 9 LJCP 194).**

Miscellaneous Presumptions

It is presumed that if a document is altered, it was made before its execution, whereas in case of a will, it is altered after its execution.

SECTION 90A provides that a court shall presume any electronic record, which is five years old and is produced from proper custody to be genuine.

Q. Discuss the law relating to "Presumption of the legitimacy of a child". Is this kind of presumption rebuttable? How far D.NA. test is admissible under Section 112 of Indian Evidence Act?

Section 112 of the Indian Evidence Act, 1872 (hereinafter referred to as the Act) relates to the legitimacy of a child born during wedlock. The law presumes that if a child is "born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty (280) days after its dissolution, the mother remaining unmarried…", it is conclusive proof of its legitimacy unless it can be proven that the parties to the marriage did not have any access to one another. The legislative spirit behind this section seeks to establish that any child born during a valid marriage must be legitimate. The law does not presume dishonourable or immoral actions unless conclusive proof can be produced for the same. Therefore, section 112 is based on the presumption of public morality and public policy.

Loopholes in Section 112 of the Evidence Act: The establishment of paternity under both, civil and criminal law, is extremely important. The law presumes the legitimacy of a child born during a valid marriage as conclusive. The only exception under the law is non-access between the parties. This "non-access" refers to the non-existence of opportunities for sexual intercourse. This creates a legal lacuna with respect to cases where paternity may be disputed even when the parties had "access" to each other, for example, in cases of adultery. In such a case, due to the standard of "conclusive proof", a party with a legitimate case trying to dispute paternity will find themselves without remedy due to the inability to produce evidence. The exception to this law, i.e. "non-access" is not wide enough to cover all possible situations under the ambit of this law. Thus, the law is a draconian law based on morality with no relevance in the modern era.

Conclusive Proof: Section 4 of the Act, lays down three degrees of presumption – 'May presume', 'Shall presume', and 'Conclusive proof'. It must be noted that section 112 of the Act uses 'conclusive proof' and thus section 4 and

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section 112 must be read together. Therefore, if the two requirements of section 112 are proven, it shall be considered as conclusive proof of legitimacy, which means that further evidence to disprove said fact may not be given. The legitimacy of such a child cannot be rebutted unless non-access can be proved. This creates problems for the party disputing the paternity of the child.

The section is based on the presumption of morality and may, in certain circumstances, hold the party disputing paternity unjustly accountable. Since the question of legitimacy is an extremely important one in cases of custody, maintenance etc., it is impractical for the section to provide such a limited exception.

Exception Of "Non-Access": Section 112 of the Act provides a very limited exception to the presumption of legitimacy. A valid marriage may not be conclusive proof if it can be shown that the parties to the marriage had no access to each other during time of conception. This has to be proved beyond reasonable doubt and not just mere balance of probabilities.

As previously stated, the section is based on a presumption of moral behavior. However, one cannot completely disregard the possibility of such behavior, in which case the party disputing the paternity is being held unjustly accountable. The purpose of law is to provide justice in a fair and efficient manner. When moral principles become the basis for a law, it defeats this basic purpose.

This can be illustrated with the help of an example. When two people are getting a divorce, one of the parties may be unjustly compelled to pay child support even though there is no biological relation between the party and the child. Thus, the scope of this exception is too restrictive and limited for the proper implementation of law.

Separation of Law and Morality: Justice A.M. Khanwilkar recently said that "Social morality cannot violate the rights of even one single individual". ***Navtej Singh Johar & Ors. v. Union of India, W. P. (Crl.) No. 76 of 2016***

Morality has no place in Law. Law may reflect the moral principles of the time, but it cannot be solely based on them. Law is a mechanism which governs society through rules and sanctions. These rules facilitate the peaceful existence of society by maintaining law and order. Morality on the other hand, is a subjective concept about 'good' and 'bad' which differs from person to person. Some may argue that law is the protection of the 'good' and punishment of the 'bad'. But this is a very narrow understanding. The Law does indeed protect the good and punish the bad, but not always. For the simple reason that one cannot define this 'good' or 'bad'. What may be good for some may be bad for others. Taking the contemporary example of homosexuality, many oppose it as immoral but even so, sexual orientation is an individual right and morality cannot be allowed to outweigh any person's rights. Similarly, Section 112 of the Act violates the right of the party disputing paternity to a fair trial by not allowing them to present evidence for the same. And since moral considerations cannot be put above the rights of people or fairness in the justice system, it stands to reason that the section must be amended.

DNA Testing to Ascertain Paternity: DNA Tests are conclusive evidence admissible under the Indian Legal System. The introduction of DNA technology, however, has faced extensive criticism and has been said to violate Article 21 (Right to Privacy) and Article 20(3) (Right Against Self-Incrimination) of the Indian Constitution.

Right to Privacy – Article 21: In ***Govind Singh v. State of Madhya Pradesh, 1975 AIR 1378*** the Supreme Court held that a fundamental right must be subject to restriction on the basis of compelling public interest. Thus, Right to Life and Liberty, which includes Privacy, is not absolute. And it is on this basis that the constitutionality of the laws affecting Right to Life and Personal Liberty are upheld by the Supreme Court which includes medical examination.

Right Against Self-Incrimination – Article 20(3): To be entitled to the protection of Article 20(3), it was held by the Supreme Court that "Self-Incrimination means conveying information based upon personal knowledge of the person

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giving the information and cannot include merely the mechanical process of producing documents in court which do not contain any statement of the accused based on his personal knowledge". Since medical tests which involve giving blood do not involve any exchange of 'personal' knowledge and are a mechanical process, they do not violate Article 20(3).

The Indian Evidence Act was passed in the year of 1872 and since then, section 112 has neither been amended nor revised. At the time, there was little knowledge of forensic techniques and the concept of DNA had not yet been discovered. Further, legislators could not foresee the existence of such scientific techniques as DNA Testing. Thus, at the time, section 112 was a valid section which protected a woman's chastity and ensured that legitimate children may not be labelled as 'bastards'. However, science and morality both have changed by leaps and bounds since then and in today's day and age, section 112 is no longer valid. The section must be revised to allow DNA testing when a prima facie case can be made to dispute paternity.

Present Legal Scenario: Before the law is criticized for not allowing DNA tests under section 112 of the Act when there exists a valid marriage, a question must be answered. Can the Court direct one of the parties to submit himself for the DNA test? The answer to this question can be traced through a series of judicial decisions.

Gautam Kundu v. State of West Bengal AIR 1993 SC 2295: The Supreme Court held in this case that (a) Courts cannot order a blood test as a matter of course, (b) There should exist a prima facie case in that the husband must establish 'non-access' in order to dispel the presumption arising under section 112 before a test can be ordered, and (c) The Court should carefully analyze with respect to what might be the outcome of requesting the blood test; whether it will have the impact of marking a child as a bastard and the mother as an unchaste woman.

Sharda v. Dharmpal, (2003) 4 SCC 493: A three Judge bench of the Supreme Court held that (a) A matrimonial court has the authority to direct a person to submit to medical tests, (b) Such an order of the Court will not violate a person's Right to Personal Liberty under Article 21 of the Indian Constitution, and (c) The Court must exercise this authority only if the applicant has a strong prima facie case and there is sufficient material before the Court. The Court also stated that if despite the order of the Court, the respondent does not submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

Thus, presently, the Court has the power to demand a person to undergo medical tests. However, under section 112 of the Act, the Court can only give such orders if non-access is proved. From the language of the judgement in the case of Gautam Kundu, we can see the moral driving force behind this section which is no longer applicable in the modern era.

Conclusion: In conclusion, there exists a lacuna in the law which leaves many people looking for remedy without any. Till now, in cases where there is access between the parties and yet one of the parties wants to

dispute paternity, DNA testing is not allowed because of the limited scope of exceptions to this law and the standard of conclusive proof. Even though the law may have been protective of women and children in a time when society was not kind to either, with the advances in social morality and science, it no longer holds valid. In stark contrast, the law is now more constrictive and unjust than protective. It needs to be revised to provide relief via medical testing in cases where there is "access" as well as a legitimate dispute over paternity.

Credit must be given to the Law Commission of India which made suggestions for the amendment of section 112 of the Act in the Indian Evidence (Amendment) Bill, 2003. The bill proposes to expand the scope of exceptions to section 112 to include tests which can conclusively prove paternity at the expense of the disputing party. It also lays down certain procedures to ensure that the test is conducted in a scientific and safe manner. The proviso to the amendment also states that if the man refuses to undergo such tests, he will be deemed to have waived his defence

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to any claim of parentage made against him. This is a much needed reform which adequately addresses the lacuna while also making it subject to stringent conditions thereby preserving the spirit of protectionism of the law. Unfortunately, this bill has not yet been passed. It is the need of the hour and must be enacted at the earliest possible.

Q. Discuss the doctrine of Estoppel as laid down in the Indian Evidence Act. Distinguish between estoppel and res judicata

The principle of estoppel is an important concept of the law of evidence. It is related to conduct. It does not allow behaving in one way at a time and in another way at other time. There is no place of contradicting a thing said in the law of evidence. It is also called Doctrine of Estoppel.

Doctrine of Estoppel: Estoppel literally means- 'to stop'. According to it, when any person says one thing at one time and another thing at another time, then he is prevented from doing so. This is an estoppel.

Section 115 of Indian Evidence Act, 1872 defines estoppel. According to it-

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true by his act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

It can be said in simple words that- Where any person intentionally causes another person to believe a thing to be true by his act, omission or declaration and such other person acts upon such belief, then that person shall not be allowed to deny the truthiness of that thing, later in a suit or proceeding. It means that a person cannot deny thing after having stated it to be true. In the case of **B. Manjunath v. C.G.Srinivas (AIR 2005 Karnataka 136)**, it has been stated by the Karnataka High Court that by way of the principle of estoppel, the plaintiff may be stopped to go back on his representation. This is the doctrine of Estoppel.

It could be explained by an illustration. A person accepts his liability to make payment under an arbitration award. Such a person cannot later challenge the award. **(Mr. Govingji Javet and Co. v. Sri Saraswati Mills Ltd., AIR 1982 Bombay 76.)** Section 115 gives a good example. 'A' intentionally and falsely leads 'B' to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

In respect of estoppels, the case of '**Shammim Beg v. Najmunnissa Begum (AIR 2007 N.O.C. 2085 Mumbai)** is quotable. In this case, a document was executed between the husband and wife an intention that the wife has begotten before the marriage with the husband. The husband had accepted the fact of knowing the child. The wife gave birth to a child on the day of marriage. The husband could not challenge the legitimacy of this child. He is bounded by his previous statements.

It becomes clear from this example that the doctrine of estoppels is based on having just in equity and fairness in action. Also, in the case of **Jindal Thermal Power Co. Ltd. v. Karnataka Transmission Corporation Ltd., (AIR 2005 N.O.C. 55 Karnataka)** it has been said that doctrine of estoppels appertains to equity and fairness in action.

In this context, the case of '**Pickard v. Spears' (1837 A and E. 469)** is a good example. In this case, the principle of doctrine of estoppels is propounded as- where any person intentionally causes another person to believe by his

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words or conduct that a particular thing as the existence and thereby encourages that person to act upon that belief in such a way that his original situation is changed, then the first person shall be stopped from stating that the existence of the actual situation was of different type.

Essential Elements: From the above definition of estoppels, the following essential elements of it reflect-

1. A person misrepresents by his act, omission or declaration,
2. Such misrepresentation is regarding the existence of any fact;
3. Such misrepresentation is intentionally caused to make a person believe a thing;
4. The other person believes such misrepresentation to be true;
5. The other person does some act believing such misrepresentation;
6. Such act causes injury to the other person; and
7. Such a person is unaware of the actual situation.

Types of Estoppel

1. **Estoppel, by record-** It is created by the decision of any competent court. When any court decides finally over a subject then it becomes conclusive and the parties, their representative, executor, administrator, etc. become bound to that decision. They can neither bring another suit on the same subject nor can make the same subject disputed. They are stopped from doing so. It is alike res judicata.
2. **Estoppel by deed-** When any person becomes bound to another person on the basis of a record regarding few facts, the neither that person nor any person claiming through him shall be allowed to deny it.
3. **Estoppel by conduct-** It is such estoppel which arises due to act, conduct or misrepresentation by any party. When any person causes another person to believe by his word or conductor encourages them to believe and the other person acts upon that belief and causes a change in their situation, then the first person is stopped from denying truthiness of his statements made earlier. Actually, this is an estoppel of general nature.
4. **Equitable Estoppel-** Such estoppels which have not been provided by any statute is called equitable estoppel. The best examples of equitable estoppels are there in Section 41 and 43 of Transfer of Property Act, 1882.
5. **Promissory Estoppel-** It has originated as an exception to consideration in the field of contract law. When ant person promises another to lend him certain relief or profit and the other changes his position on the basis of such promise, then the person making promise shall be stopped from stating that his promise was without any consideration.

Exceptions

1. It does not apply to those matters where both parties have the knowledge of truthiness.

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2. It does not apply against statutes. It cannot contradict the provision of statues. It cannot also remove the condition of statues.

3. It does not apply to regulations.

4. It does not apply to ultra virus orders and decisions.

5. It does not apply to questions of law.

6. It does not apply to sovereign acts of the government.

Section 116: The section deals with estoppels of-

1. a tenant

2. a licensee of the person in possession

while it is not exhaustive in nature and it mainly postulate that there is a tenancy in continuation and that it had its beginning at a given date from a given landlord, and provides that neither a tenant nor anyone claiming through the tenant shall be heard to deny that the particular landlord had at that date a title to the property. And there is no exception even for the case where the lease itself discloses the defect of title.

In the ordinary case of lease intended as a present demise, the section applies against the lessee, any assignee of the term and a licensee.

- **Kumar Raj Krishna Prasad Lal v. Baraboni Coal Concern Ltd.(1937) 64 IA 33:** After the act the Privy Council in the following case it has been declared that the section does not deal with all kinds of estoppel which might arise between the landlords and the tenant.

- **Adyanath Ghatak v. Krishna Pd. Singh AIR 1949 PC 124:** Under this case the attornment was under the threat of eviction by the title paramount and a new journal relationship of landlord and tenant was created. The estoppels thereafter arise against the attorned landlord. ***[Tej Bhan Madan v. II Addl. D.J. AIR 1988 SC 1413]***

The rule of estoppels embodied in this section is not applicable to the case of a tenant who purchases subsequently the share of a co-sharer in the leased property and files a suit for the partition on the basis of such purpose.

This section stops a defendant from challenging the title of the predecessors in interest of the plaintiff from whom he takes the land. Apart from the section, the doctrine of estoppel applies even to a case where the tenant attorns to the landlord. The estoppels estoppel to deny the title of the lessor continuous to apply to the lessee until he has given possession to the lessor on the determination of the tenancy. If there has been eviction by title paramount the lessee is not estopped from denying the title of the lessor. **[Gajadhar Lodha v. Khas Mahatadih Colliery CO.(1959) Pat.806]**

This is perfectly intelligible doctrine, as the estoppels arise not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor.

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- **Ziauddin v. Bansi Lal 1996 AIHC 1425 (Delhi):** An unauthorized occupant of the property, subsequently converting his possession into that of a tenant by executing a rent note, would be stopped from challenging the title of the landlord and his right to recover rent of arrears of rent.

Whether tenant should be in possession of the property to stop him from denying his landlord's title-

The privy council has laid down that a tenant is estopped from denying his landlord's title whether he was or not already in possession of the property at the time when he took his lease.**[Krishna Prasad Lal Singha Deo v. Baraboni 1034(1938) Cal.1]**

- **Mujibar Rahman v. Isub Surati(1928)56 Cal.15:** The estoppel operates in the case of a tenant who remains in possession even after the termination of the tenancy of the notice to quit.

- **Jamila Khatoon v. Ajoydhya Pathak (1996) AIHC 2928 (Gau.):** A tenant who has been let in possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender. Without openly and actually going out of the occupation, the tenant cannot deny the landlord's title.

- **Narayanaswami v. Roya Poulle Amala 1994 Mad**.: When a tenant denied the title of his landlady claiming himself to be absolute owner of the premises in his occupation but could produce no evidence for his claim, it was held that the denial was mala fide and the tenant was liable to be evicted on that ground. **The basics of this section are covered in form of-**

1. Immovable property-

Lakshman v. Ramji (1920) 23 Bom. LR 939: A fishery is considered the immovable property for the purpose of this section.

2. During the continuance of tenancy-

Bala v. Abai (1909) 11 Bom. LR 939: A tenant is only precluded during the continuance of the tenancy from denying that the landlord had at the beginning of the tenancy a title to the property subject of the tenancy. The section is no bar to a tenant showing that his landlord had no title at a date previous to the commencement of the tenancy. The words of this section leave it open to the tenant to show that his landlord's title has subsequently expired.

Jogendra Lal Sarkar v. Mahesh Chandra Sadhu (1928) 55 Cal. 1013 If the term of the lease has expired when a suit is brought, the tenant can dispute the title of the landlord. Though the tenancy may be continuing, it is quite open to the tenant to plead and show that his liability to pay the rent wholly or partially or for a time ceased: such a plea is really one of confession and avoidance and has been held available of the tenant.

Kishan Gopal Agarwalla v. Ramdulari Sah AIR 1996 Gau.39: A tenant is estopped from challenging the title of the co-owner landlord.

3. At the beginning of the tenancy- This section only provides that a tenant cannot be permitted to deny that the landlord at the beginning of the tenancy had a title to the property. The section does not disentitle a tenant to dispute the derivative title of one who claims, since the beginning of the tenancy, to have become entitled to the reversion.

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4. No person who came upon any immovable property by the license of the person in possession-

Ramuthi Madalaichamy v. Thangarathina Nadar AIR 1991 Mad. 229: Where it is proved that the occupation by a person of immovable property is by permission of another, the occupier is estopped from denying the other's title.

5. Benami title- The Madras High Court has held that where a lease is executed by a tenant in favour of a benamidar, the real owner and not the benamidar is regarded as the landlord whose title the tenant is stopped from denying under this section.

While a benamidar has no right to sue unless he can show a legal right to sue under the general law. The Calcutta High Court is of the opinion that the tenant is estopped from raising the question that his lessor is a benamidar of someone to whom he has paid rent.

Section 117: This section deals with further instances of estoppel by agreement. Section 116 and 117 are however not exhaustive of the doctrine of estoppel by agreement.

Under this section, an acceptor of a bill of exchange cannot deny that the drawer had authority to draw such bill or to endorse it.

But they may deny that the bill was really drawn by the person by whom it purports to have been drawn. *(explanation 1)*

A bailee or a licensee cannot deny that his bailor or licensor had, at the commencement of the bailment or license, authority to make the bailment or grant the license. But, a bailee if he delivers the goods bailed to a third person, may prove that such person had a right to them as against the bailor. *(explanation 2)*

Bill of exchange- Estoppels in the case of negotiable instruments are instances of estoppels by agreement or contract; this could be understood by referring to sub-section 41 and 42 of negotiable instruments act.

Forged endorsement- No person can claim a title to a negotiable instrument through a forged endorsement and such endorsement is a nullity and must be taken as if no such endorsement was on the instrument. **[Banku Behari Sikdar v. Secretary of State for India (1908) 36 Cal. 239]**

Difference between Estoppel and Res Judicata

Res judicata corresponds to the part of the doctrine of estoppel, which is known as estoppel by record. **Estoppel** as enunciated in Section 115 of the Indian Evidence Act is by conduct or agreement or estoppel in pais.

Thus, even though res judicata may be said to be included in the doctrine of estoppel, as understood in the wider sense of the term, it must be distinguished from estoppel as distinctly provided for in the Indian Law of Evidence.

The rule of res judicata is based on public policy, i.e., it is to the interest of the State that there should be an end to litigation and belongs to the province of procedure.

Estoppel, on the other hand, is part of the law of evidence and proceeds on the equitable principle of altered situation, viz., that he who, by his conduct, has induced another to alter his position to his disadvantage, cannot turn round and take advantage of such alteration of other's position.

Res judicata precludes a man from avowing the same thing in successive litigations, while estoppel prevents a party from saying two contradictory things at different times.

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Res judicata is reciprocal and binds the parties, while estoppel binds the party who made the previous statement or showed the previous conduct.

Res judicata, as observed by ***Mahmud, J. in Sita Ram v. Amir Begum,*** prohibits the court from entering into an enquiry as well as to a matter already adjudicated upon; estoppel prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who, relying upon these declarations or acts, has altered his position.

In other words, res judicata prohibits an inquiry in limine, and bars the trial of a suit while estoppel is only a piece of evidence and emphasises that a man should not be allowed to retrace the steps already walked over.

Res judicata ousts the jurisdiction of the court, while estoppel shuts the mouth of a party.

The doctrine of res judicata results from a decision of the court, while estoppel results from the acts of the parties themselves.

Q. "An accomplice evidence is unworthy of credit unless he is corroborated in the material particulars" – Discuss.

Accomplice evidence is untrustworthy for the following three reasons:

(1) An accomplice is likely to swear falsely in order to shift the guilt from himself.

2) As a participator in crime, and consequently as an immoral person, he is likely to disregard the sanction of an oath.

(3) He gives evidence under a promise of a pardon or in the expectation of implied pardon, if he discloses all he knows against those with whom he acted criminally; and this hope would lead him to favour the prosecution. ***(Queen Empress v. Maganlal, (1889) 14 Bom. 115)***

The emphatic statement in Section 133 that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice may, at first sight, lead an inexperienced and untrained reader to suppose that the legislators desired to encourage convictions on the uncorroborated evidence of an accomplice.

However, this is not so, because the law in Section 133 is qualified by a rule of caution and prudence in Illustration (b) to Section 114, where it is declared that an accomplice is unworthy of credit unless he is corroborated in material particulars. This rule of caution has thus now acquired the force of law.

The nature and extent of corroboration of accomplice evidence must necessarily vary with the circumstances of each case, and it is not possible to enunciate any hard and fast rule. But the guiding rules laid down in ***R. v. Baskerville (1916 2 K. B. 658)*** are clear beyond controversy. They are:

(1) It is not necessary that there should be independent confirmation, in every detail, of the crime related by the accomplice. It is sufficient if there is a confirmation as to a material circumstance of the crime.

(2) The confirmation by independent evidence must be of the identity of the accused in relation to the crime, i.e., confirmation of some fact which goes to fix the guilt of the particular person charged, by connecting or tending to connect him with the crime. In other words, there must be confirmation in some material particulars, that not only has the crime been committed, but that the accused has committed it.

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(3) The corroboration must be independent testimony, that is, by some evidence other than that of the accomplice, and therefore, one accomplice cannot corroborate the other.

(4) The corroboration need not be by direct evidence that the accused committed the crime; it may even be circumstantial.

This rule has been confirmed by the Supreme Court in ***Rameshwar v. State of Rajasthan, (AIR 1952 S.C. 54),*** and ***Vemmireddy v. State, (AIR 1956 S.C. 379)***.

It may also be noted that Rules No. (1) and (4) (above) were reaffirmed by the Supreme Court in ***S. v. Baswant, (AIR 1958 S.C. 500).***

The same question came for consideration before the Supreme Court in ***Bhiva v. State of Maharashtra, (A.I.R. 1963 S.C. 599)***, in which it was held that the combined effect of Section 133 and S. 114; Illustration (b) may be stated as follows:

“According to the former, which is a rule of law, an accomplice is competent to give evidence, and according to the latter, which is a rule of practice, it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. The corroboration should be in material particulars and qua each accused.”

Q. What is ‘Leading question’ and when leading question may be asked? Can the court ask leading question?

Section 141 to Section 143 of Chapter -X, Part III of the Indian Evidence Act 1872 deals with leading questions. Section 142 and Section 143 provides circumstances under which the leading Questions may be asked or may not be asked. Leading Questions have been defined under section 141 of the Indian Evidence Act 1872.

Meaning: The expression "Leading Questions" literally means a question which itself suggest answer. As expected by the person asked the same, any questions which leads to answer, or a question which is pregnant with the answer.

Definition: Section 141 of the Indian Evidence Act 1872 defines 'Leading Questions' as, “Any questions suggesting the answer which the person putting it wishes or expects to receive is called a leading question."

Bentham: Bentham defines leading questions as," A question is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer.

Examples

a) Is your name so and so?

b) Do you reside in such and such a place?

c) Are you not in service of such and such person?

d) Have you not lived with him for so many years?

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e) Did you see him enter X's office and take a file?

It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information is, in reality, giving instead of receiving it.

Taylor: According to Taylor "A Leading question, in other words, is one which suggests to the witness the answer desired or which embodying a material fact, admits of a conclusive answer by a simple negative or affirmative."

It is a question framed in such manner that it throws a hint as to or suggests directly indirectly, the answer which the examiner desires to elicit from the witness, e.g., when a witness called to testify to an alleged assault on A by B is asked, " Did you see B take a stick and Strike A "? Or did you not hear him say this.

When leading Questions must not be asked?

According to Section 142 of Indian Evidence Act, leading questions may not be asked in **Examination-in-chief,** or in a **Re-examination**, except with the permission of the Court.

Section 142 run as follows: Leading questions must not, if objected to by the adverse party, be asked in an **examination-in-chief**, or in **re-examination**, except with the permission of the Court.

The court shall permit questions as to matters which are introductory or undisputed or which have, in its opinion been already sufficiently proved.

When Leading Questions may be asked?

Leading questions may be asked in the following cases.

1) According to Section 143 of the Indian Act, Leading Questions may be asked in cross-examination.

2) Under Section 142- In Examination-in-chief, Leading questions can only be asked with the permission of Court in certain matters.

3) When the witness has defective memory, it may be agitated by a few leading questions.

4) When the object of the leading question is to contradict another witness as to the expressions used by him but at which denies having asked, the witness may be asked leading questions.

Objection to Leading Questions: Objection to leading question is not that they are illegal but only that they are unfair. The rule excluding leading questions is intended to prevent unfairness in the conduct of the inquiry. The Act gives absolute discretion to the court to allow or disallow leading questions.

Q. How many witnesses are required to prove a case?

Section 134- Number of Witnesses: 'In any case, no particular number of witnesses shall be required for proof of any fact in the case'.

This section of Indian Evidence Act clearly laid down that no particular number of witnesses required to proof or disproof the facts of the case. This section applies to civil and criminal cases. This section is based on the popular

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maxim that evidence is to be weighed and not counted. There is no rule of law that the unsubstantiated testimony cannot be accepted. The rule is of prudence and its adoption or not depends on the circumstances of the cases. For ascertaining the truth by the court, the number of witnesses is not considered, but the quality of evidence is taken into a note.

In **State of M.P. V. Chhagan**, the court held that the section 134 of IEA clearly mandates that "in any case no particular number of witnesses is required for the proof of any fact of the case.

Indian legal system does not emphasise on the plurality of witness. Neither the judiciary nor the legislature (S.134, Evidence Act) mandates the compulsion of a particular number of the witnesses to find truth. Our legal system always has laid down the emphasis on the weight, quality and value of the evidence rather quantity and plurality of witnesses. Therefore, it is completely at the discretion of the court to convict accused on the basis of the single testimony also and in many cases, the court may acquit accused when it is not satisfied by the testimony of several witnesses.

It is not necessary to examine all persons who were present at the scene of the crime committed for proving the guilt of accused. Any rule that a particular number of witnesses are required to prove guilt would hamper the justice delivery system as in many cases it is not practicable to bring more than one witness. If any such rule were made than many crimes would go unpunished. In many secret murders even one witness to the crime is not obtainable and in these cases court needs to depend upon the circumstantial evidence. The discretion of judge has been left free from strict restrictions.

Quantity of Evidence Required for Judicial Decisions

A plurality of witnesses is a rule of prudence and not an inflexible requirement of the evidence has to be weighed not counted. Acceptability of evidence is material not the number of witnesses. If the court thinks unsafe for convicting the accused person on the testimony of a single witness, does not mean that the evidence of the witness is castigated. It is not dishonoring against the evidence of any witness if court merely wants to crossexamine the testimony by getting assurance from other sources.

In riots cases, it would be unjust to convict accused on the basis of the testimony of the single witness. In these cases, the rule of prudence requires that court should consider the emphasis on the plurality of eye witnesses for fair judgment. In the cases where sole eye witness is changing its stand about the identity of the accused, manner of incident and place, in that case, his testimony should not be relied upon.

In **Ganpat Ram case**, the court stated that when the testimony of the sole eye witness is reliable, trustworthy and cogent, the evidence cannot be rejected on the grounds of the some minor omissions considering the fact the examination of the evidence took place years after the occurrence of the incident. In cases, where it is not practically possible to present more than one witness before the court, the court should rely on the testimony of the sole witness if it satisfies the court.

Corroboration Of Testimony Of Sole Witness: In **Mohammad Sugal case**, the accused was convicted of murder on the basis of the uncorroborated testimony of a child witness, at the scene of the crime only, sole eye-witness was a girl of 10-11 years present. It was appealed to the Privy Council that conviction for the offence could not be based on uncorroborated testimony of the child; the Privy Council observed that there was no provision for inadmissibility of such testimony in India, unlike England. The court held that once the evidence is admissible before Court, then the Court could act upon it. It is a rule of prudence not to act upon the testimony of the child, but it is not a law. Justification to the testimony of the single witness should be emphasized upon where nature of the testimony itself requires. However, no general rule of some witnesses require could not be laid down.

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In case of **Shanker v. State**, the Rajasthan High Court laid down the following proposition in respect to corroboration of evidence of single witness:

1. As per the general rule, there is no fixed number of witnesses required for any particular case; a court can act on the testimony of some other witnesses of indifferent character;

2. Unless corroboration is insisted upon by Statute, in the exceptional cases where the nature of testimony of single witness itself requires corroboration which courts should insist upon, for example in the case of testimony of child whose evidence is that of related character or an accomplice;

3. The requirement of the corroboration of the testimony of a single witness is dependent on facts and circumstances of each case, and there is no general rule which can be laid down this matter like this and it also depends on the discretion of the Judge, who deals with the case.

In Cases of Unlawful Assembly and Riot: The testimony of a sole witness at the incident would be sufficient to establish the identification of the accused person as a member of an unlawful assembly if it is completely reliable. In **Binay Singh case,** the Supreme Court observed that in cases where the assembly is so large where many were a witness to the incident, it is prudent to have at least two reliable witnesses for the identification of accused. In **Masalti Case**, the Supreme Court observed that in the case of rioting and similar offence it is more prudent not to convict the accused on the basis of the testimony of a single eyewitness, as it would be an unfair and grave injustice for accused who is convicted. It is the quality of the evidence and not the number of witnesses that matters in such case.

In Dealing With Sexual Offences: In rape cases, there is no principle of law which forbids a conviction based on the victim's uncorroborated testimony, though the victim wants in chastity if the jury is satisfied with the truth. However, the jury and the court should carefully guard themselves against the excessive sympathy for the victim. In **Rameshwar Kalayan Singh case**, the Supreme Court held that in a sexual offence like rape, corroboration is not essential before conviction, as the victim of the rape cannot be considered as a partner in offence, as it was without her consent, therefore, no need to corroborate her testimony. In cases where circumstance requires for the corroboration than the testimony of victim needs to be corroborated for the satisfaction of the court.

In **Vadivelu Thevar case**, the Supreme Court observed that in the cases of sexual offences, the testimony of victim itself need not be sufficient if the victim is suspected of the partner in crime. In **Sannaila Subba Rao case**, she was kidnapped and kept in room for month and was raped by two accused repeatedly, the court convicted the accused based on the testimony of minor girl with a reasoning that as she didn't have any enmity against the accused, and there were no reasons found for giving false evidence against accused at the risk of her future.

In **Prem Narian case**, there was corroboration of the testimony of the minor girl by her parents and others but medical report showed that she was raped, in this case, court convicted the accused on the basis of the testimony of minor with the reasoning that she had sufficient maturity and understanding and her evidence free from any defect. In sexual offences like rape and others, the conviction can be based on the uncorroborated testimony of the prosecution, if the testimony of the victim is found to be convincing, reliable and beyond reasonable doubt. In these cases, the court needs to be satisfied that the victim is telling the truth and accused was not falsely accused of the offence.

Conclusion: Thus, it is clear that the quantity of the witness does not matter rather the quality of witness does. Since there is no general rule for the number of witnesses required in any particular case, therefore the testimony of the sole witness can also be relied upon to convict the accused, if it is found to be reliable and cogent.

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Q. Is a child competent witness? Write down the evidentiary value of child witness.

Testifying by a witness is considered as key evidence in any court proceeding, helping the court to decide the final matter. However, for a witness to testify, there is a basic criterion he/she must fulfil, i.e., to be of a sane mind and be competent enough to testify.

In the past, we have often observed that one of the key witnesses to be a child, who was party to the event, but the admissibility of his testimony was not absolute in nature.

The Indian judicial system has laid down some rules to determine the competence of a testimony of a child witness, which has also been provided by the Indian Evidence act and other relevant judgements.

Question of Admissibility

For a testimony to be admissible, it must fulfil certain conditions, such as;

- A witness should be competent enough;
- Must understand the question put before;
- Must comprehend and give pragmatic and rational answers to the same.

The final discretion lies on the court to comprehend and determined whether the testimony shall be permissible or not, keeping the mind the account of the given facts and situation.

Hence, a court of law does prohibit anyone from testifying, as long as they are able to satisfy the above conditions to the satisfaction of the court of law. Thus, we have often questioned as to why the testimony of a child is a subject matter to various questions.

Testimony of a Child

A child or a person in his years of development is often subject to certain conditions, depending upon the conditions he lives in and nurtured in, keeping in mind the socio-economic contrasts every person is brought up, in India.

A child's testimony can vary as it can be doctored by way of torture and coercing, and is not subject to absolute self-authority and assessment. As children, the mental development is tender in nature and can vary in different situations.

Hence, a pertinent question here to ask would be, 'How does one define '**maturity**' of an individual?'

Maturity is subject to the background and environment in which one has been born and brought up in, hence, maturity is subjective and varies among various individuals.

In a landmark case, ***Suresh v. the State of U.P*** established that a testimony from a 5-year-old child shall also be admissible, so long as the child is able to comprehend and understand the question of the given issue. Hence, it declared that there is no minimum required age for a person to legally testify in the court of law.

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Section 118 of the Indian Evidence Act mentions who is considered as competent enough to testify in the court of law; '*All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years…*"

Hence, the above provision clearly states that one shall testify in case competent enough if considered otherwise by the court of law.

Competence of the Testiomy

The reason behind the court's apprehension of a child's testimony arises due to various factors. Children are often considered to be tender and at a volatile age where certain instances can make a lasting impact on the child's memory and the way he perceives things from thereon. The court needs to take into account various factors before making the testimony admissible, such as, making sure that the child clearly understands the nuances of the circumstance, what led to the occurrence of those circumstance(s). Children often tend to be submissive due to the pressure and the tension surrounding the entire scenario, and the entire judicial proceedings can take a toll on a sensitive mind, leading to breakdown and change in testimony. Hence, the court needs to take care of intricate aspects, making sure that the child's testimony is not affected in any way.

Principle of "Voir dire test"

"*Voir dire Test*": A concept derived from the Anglo-Norman phrase, which refers to 'Oath to tell the truth'. The word voir (or voire), in this combination, comes from French which states, "That which is true".

The test is conducted for the purpose of deciding the competency of a child witness. Usually, the judge puts questions to the child witness to test his veracity and to verify that the facts build up with the progression of the accompanying facts.

This test is a precursor to determining the maturity and capability of the child to act in the full capacity as a witness to testify in front of the judge, hence, the judge may examine the child by posing certain questions which may not be related to the ongoing case. This is done in order to determine the absolute competency of the child witness, which may be limited in nature otherwise.

In the case, **'*Rameshwar S/o Kalyan Singh v. The State of Rajasthan*'**, the court held that every person is competent to be a witness in the court of law, unless incapable of understanding the question put before him/her, keeping in mind the provisions of Section 118 of the Indian Evidence Act.

Capability to understand at a young age is more likely to be dependent and to be formed at the opinion and perception of what others say and portray, due to which the testimony of a child is more likely to be modified or altered. Hence, dealing with a child witness is of key importance. This was also brought up in the landmark case, **"Nivrutti *Pandurang Kokate & Ors. v. The State of Maharashtra",*** where the Supreme Court held that the testimony of a child witness must be scrutinised so as to make sure that it was not given under any situation of coercion and undue influence, and must corroborate other given evidence as well.

Child testimony in cases of sexual abuse and molestation

In the recent past, the cases of child sexual abuse and child molestation have come under the limelight. A 2007 survey by the Ministry of Women and Child Development showed that 53% of children in India had been sexually abused, bringing us to our next question, "To what extent can the child testify in his own case of sexual abuse/molestation?"

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Children and infants are often victims of sexual abuse and molestation, and often are scared and apprehensive about disclosing the same to their parents and peers. This was only one indication of the increasing public pressure for the law, which was passed by both houses of Parliament on May 22, 2012. The Protection of Children against Sexual Offences Act (POCSO) came into effect on Children's Day, November 14, 2012, yet, its applicability remains to be a slippery slope, as children and infants are not very well equipped to ascertain and understand what they might have gone through.

Recently, the Supreme Court of the *United States of the America,* in its landmark judgement, ***Ohio Vs. Clark,*** made it easier for prosecutors to bring child-abuse cases without young children having to testify, allowing jurors to hear from teachers whose students told them they were abused. The unanimous judgement came in the case of a 3½year-old Ohio boy whose wounds were visible to teachers at his day care centre. The boy was too young to testify, and thus, the court allowed the teachers to testify on his behalf, as the matter was immediately reported to the teachers by the child.

The veracity of the statement given by the child is always questionable, but other systems must be devised to verify the given testimony, making sure that it is unaffected by other external factors and is dealt with extreme care and caution.

Conclusion: As per the principles of the *voir dire test*, a judge must ascertain and verify the competency of the child to testify in the court of law. What must be understood is that children of such young and tender age must be dealt with extreme care and sensitivity, which might not be the expertise of the judge handling the case.

Trained personnel's and counsellors must work with the court, who can deal with the child in a prescribed manner to ensure that the child's testimony is not doctored in any way. The court takes into account expert opinion of various professionals and analyse them accordingly. There is also a requirement for a specific legislation and amendment to the criminal law which deals with child sexual abuse, which must be more gender neutral in nature.

The court must also take into account the testimony given by a person on behalf of the child and to what extent it can be held valid, in case a child is not competent enough to testify and understand what he/she went through.

Q. Can a dumb person be witness? Write a note on accomplice witness.

The testimony of deaf and dumb witnesses can by relied upon by courts as they are competent and signs and gestures are admissible piece of evidence.

As per Section 119 of the Indian Evidence Act, testimony of witness unable to communicate verbally is valid as long as the same in done in an intelligible manner to the satisfaction of the court.

Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

A dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing or if literate, through signs and gestures if he is unable to read and write.

To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing.

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The apex court passed a ruling confirming the aforesaid provision while dismissing an appeal filed by the Rajasthan government against the acquittal of a convict Darshan Singh in a murder case in Rajasthan's Jodhpur district.

Darshan was charged with the murder of Kaku Singh on May 4, 2001 at the instigation of the former's sister with whom the deceased reportedly had a intimacy. Geeta, the deaf and dumb wife of Kaku, was the star witness on whose testimony Darshan was sentenced to life imprisonment by a fast track sessions court.

However, the high court acquitted Darshan following which the state filed the appeal.

The apex court while holding that deaf and dumb persons are competent witnesses, however, felt that the high court had rightly acquitted Darshan of the charges as the statement of Geeta who had made the same through her father as interpreter was not made under an oath.

"Be that as it may, her statement had been recorded with the help of her father as an interpreter, who for the reasons given by the high court, being an interested witness who had assisted during the trial, investigation and was examined without administering oath, made the evidence unreliable.

"In such a fact-situation, the high court has rightly given the benefit of doubt and acquitted the respondent," the bench said.

The apex court however, rejected the argument of the defence that testimony of a deaf and dumb person was not valid under law.

Citing its earlier judgement in the **MP Sharma & Ors. Vs Satish Chandra, District Magistrate, Delhi (1954**), the apex court said a person can be a witness not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness.

"The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots.

"However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed.

"When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath," the bench said.

The apex court said that in view of provisions of Sections 4 and 5 of the Oaths Act, 1969, it is always desirable to administer oath or statement may be recorded on affirmation of the witness.

The main purpose of administering of oath to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility.

"On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language.

"The law required that there must be a record of signs and not the interpretation of signs.

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In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act," Justice Chauhan added.

Accomplice Witness

An accomplice means a person who has taken part in the commission of a crime. When an offence is committed by more than one person in concert, every one participating in its commission is an accomplice. Conspirators lay their plot in secret; they execute it ruthlessly and do not leave much evidence behind. Often, therefore, the police have to select one of them for the purpose of being converted into a witness. He is pardoned subject to the condition that he will give evidence against his former partners in the crime. He is then known as an accomplice, turned witness or an approver. He appears as a witness for the prosecution against the accused person with whom he acted together in the commission of the crime. The question is to what extent his evidence or testimony can be relied upon to convict his former associates. What is the value of evidence of a former criminal turned witness?

Two provisions in the Act touch this problem. Section 133 categorically declares that an accomplice is a competent witness and the Court may convict on the basis of such evidence and the conviction will not be illegal simply because it proceeds upon the uncorroborated testimony of an accomplice. The other dealing with the matter is in the illustration (b) to section 114, which says that the court may presume that an accomplice is unworthy of credit unless corroborated in material particulars. These provisions should first be reproduced.

Section 133 Accomplice — An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. **Section 114. Illustration (B) —** The court may presume that an accomplice is unowrthy of credit, unless he is corroborated in material particulars.

The apparent contradiction between these two declarations should first be resolved. Section 133 is a clear authorisation to the courts to convict on the uncorroborated testimony of an accomplice, but since such a witness, being criminal himself, may not always be trustworthy, the court are guided by the illustration appended to Section 114 that, if it is necessary the court should presume that he is unreliable unless his statement are supported or verified by some independent evidence.

Categories of Accomplices—

In order to be an accomplice, a person must participate in the commission of the same crime. This participation may be done in various ways. The modes of taking part with a crime are treated under the head of :-

(1) Principals in the first and second degree — A principal of the first degree is one who actually commits the crime. A principal of the second degree is a person who is present and assists in the perpetration of the crime. These persons are undoubtedly under all the circumstances accomplice.

(2) Accessories before the facts — An accessory before the fact is one who counsels, incites, connives at, encourages or procures the commission of the crime. Of these persons, those who counsel, incite, encourage or procure the commission of the crime are certainly accomplices.

(3) Accessories after the fact — Every person is an accessory after the fact to a felony, who knowing that a felony has been committed by another person receives, comforts or assists him in order to escape from punishment; or rescues him from arrest, or having him in custody for the felony, intentionally and voluntarily allows him to escape, or opposes his arrest. Three conditions must unite to render one an accessory after the fact:

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(1) the felony must be complete;

(2) the accessory must have the knowledge that the felony has been committed;

(3) the accessory must harbour or assist the principal felon.

Corroboration as Rule of Caution

Once it is determined that the person who has appeared as a witness in fact an accomplice, the question then arises as to what value is to be attached to his evidence, namely, whether it should be acted upon in itself or some independent verification should be thought of his statements. It has been observed from the earliest times as a rule of caution which has now become virtually a rule or law, that the evidence of an accomplice should stand the test of verification at least in main points. This is known as corroboration. The reasons why corroboration has been considered necessary are that :-

(1) he has been criminal himself, and, therefore, his testimony should not carry the same respect as that of a lawabiding citizen.

(2) he has been faithless to his companions and may be faithless to the court because he has motive to shift the guilt from himself to his former companions, and

(3) if he is an approver, he has been favoured by the State and is therefore, likely to favour the state.These reasons dictate the necessity for corroboration.

Once corroboration in material particulars is found, the testimony of an accomplice can be the basis of conviction.

The meaning and nature and extent of corroboration were explained by the court of Criminal Appeals in **R v. Baskerville :** The case involved an indecent assault upon two young boys with their consent at the residence of the accused. Thus both the boys were accomplices. The only way to corroborate the evidence of one was to refer to the statement of the other. Should the evidence of one accomplice be corroborated with the evidence of another accomplice. The court held that the general principle is against it.

In Bhuboni Sahu v. The Emp., eight persons were prosecuted for a murder; four of them were acquitted. Of the remaining, one appealed to the Privy Council. The evidence against the appellant consisted of (a) evidence of an accomplice who had taken part in the murder and had become an approver, (b) the confession of another accused person implicating himself and the appellant, and © the recovery of a cloth which the deceased was wearing and a Khantibadi in circumstances which were taken to verify the evidence of the accomplice

The appellant was acquitted by the court. The Court Observed : The combine effect of Section 133 and 114, Illustration (b) may be stated as follow:

According to the former which is a rule of law an accomplice is competent to give evidence and according to the latter which is a rule of practice is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the court will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particular. The law may be stated in the words as in R v. Baskerville.

There is no doubt that the uncorroborated evidence of an accomplice is admission in law. But it has been long a rule of practice at common law for the Judge to warn the jury of the danger of convicting and in the prisoner on the uncorroborated testimony of an accomplice, and in the discretion of the Judge, to advise them not to convict upon

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such evidence, but the Judge should point out to the jury that is within their legal province to convict upon such unconfirmed evidence.

In **Narayan Chetanram Chaudhary v. State of Maharashtra**, accused committed offence of robbery and murder. All deaths, except of a child, were caused by the A1, child was killed by A2. Raju, PW 2 actively participated and facilitated the commission of the crime. The murders were apparently committed to wipe out all evidence of robbery and committed by the accused persons. Accused were arrested from different places. In the identification parades they were identified by various witnesses. After the commitment but before the commencement of the trial Raju expressed his wish to make a confessional statement. The trial court accepted the application. The accused Raju was tendered pardon on the condition that he shall make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. High Court also accepted the reference.

The learned counsel for the appellants argued that as the statement of the approver was recorded after an unexplained prolonged delay, the same could not be made the basis for conviction of the accused. To this it was held that, Otherwise the words of the section "at any time after commitment of the case but before judgment is passed" are clearly indicative of the legal position which the legislature intended. No time limit is provided for recording such a statement and delay one of the circumstances to be keep in mind as a measure of caution for appreciating the evidence of the accomplice. Human mind cannot be expected to be reacting in a similar manner under different situations. Any person accused of an offence, may, at any time before the judgment is pronounced, repent for his action and volunteer to disclose the truth in the court. Repentance is a condition of mind differing from person to person and from situation. Court, therefore, do not find any substance n the submissions of the learned defence counsel that as the statement of the approver was recorded after prolonged delay, no reliance could be placed upon it.

Learned counsel further contended that conviction based upon the uncorroborated testimony of the approver is neither safe nor proper particularly in a case where extreme penalty of death is awarded. The Court said after making reference to **Bhuboni Sahu v. R. ; R v. Basherville etc**. the court said that We have minutely scrutinized the evidence of PW2 and the corroborative evidence noticed by both that trial court as well as High Court and find no substance in the submission of the learned counsel for the appellants that the testimony of PW 2 is vivid in explanation and inspires full confidence of the court to pass the conviction on the appellants for the offences with which they were charged. The corroborative evidence to the aforesaid statement leave no doubt in the mind of the court regarding the involvement of the appellants in the commission of the crime for which they have been convicted and sentenced.

Nature and extent of corroborations: As to the nature and extent of corroboration required, cited the opinion in R. v. Stubbs, namely, that the evidence of an accomplice must be confirmed not only as the circumstances of the crime, but also as to the identity of the prisoner.

Corroboration in Rape Cases: The case is not directly on the subject of "accomplice", but is on the point of corroboration. Corroboration is a common point between the victim of rape and an accomplice because through the woman who has been raped is not an accomplice, but her evidence has been treated by the courts on somewhat similar line. Her evidence requires corroboration the same way as that of an accomplice.

Q. What are facts relevant in a suit for damages?

In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

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Section 12 of the Evidence Act provides for determination of damages when suits for the damages are claimed by the party. Under this section the court can determine the amount of damages in an action based on contract or tort. In a suit for damages, the amount of damages must be a fact in issue. Thus the section lays down that evidence tending to determine, i.e., to increase or diminish damages is admissible. Section 55 of this Act lays down the conditions under which evidence of character may be given in civil cases to affect the amount of damages. Similarly Section 73 of the Indian Contract Act also lays down the rule governing damages in actions in contract. In a suit for damages for a breach of contract of marriage, the evidence as to status of the defendant may be given for determination of the amount of damages. Section 73 is based on principles laid down in ***Hadley v Baxendala.***

Q. "The best evidence must always be given". Why do courts always insist upon best evidence being adduced? Discuss if any exception is allowed.

The Best Evidence Rule: An ancient established doctrine of the law of evidence, the Best Evidence Rule specifies that the best evidence existing in a particular case and available, according to what the circumstances would allow or the party will be able to produce, ought to be produced. Primary evidence (usually the original document in the contract) should be compulsorily produced in front of the court, to prove its contents, but for other inevitable reasons like it being misplaced, etc. During the formation of a contract, the presence of several concerns like defectiveness of human memory, ignorance of witnesses and the influence of prejudice necessitates the presence of a universal rule which states that the best evidence in every case ought to be made available to the court. A brilliant illustration would be that oral statements of the physical condition of an object would not be permitted to be produced in court when the object itself can be brought as evidence.

The Best Evidence rule, often called a "cardinal principle" of the Indian Evidence Act requires proving by introducing an original document, and when the best possible evidence is not adduced, it throws suspicion on the case and decreases the reliability of belief on any other evidence that may be produced. Best evidence in case of documentary evidence is the original copy of the document and oral evidence requires the witness to state as evidence only something perceived by that person directly. The production of greatest amount of evidence is not required, but the rule is designed such that it prevents the introduction of evidence which assumes that the party possesses the better evidence. The object of the rule is to mainly prevent fraud and aid in the administration of justice.

However, there have been several views against the Best Evidence Rule, stating the need for a Secondary Evidence Rule allowing secondary evidence admissible to prove the contents of a document. The claim is that the Best Evidence Rule is unnecessary in a situation of broad pre-trial discovery due to swift technological developments in electronic communications, because the object of the rule was to guard a party from any kind of fraud and prevent misinterpretation of documents, which is highly possible due to pre-trial discoveries.

The concept of Best Evidence can be seen as being embedded in the Indian Evidence Act, 1872 and as per Section 91, the original document is given prime importance as an element of Best Evidence.

Evidence of Terms of Contracts, Grants and Other Disposition of Property Reduced to Form of Documents (Section-91): Where the fact to be proved is embodied in a document, the document is the best evidence of the fact. Such fact should, therefore, be proved by the document itself, that is, by the primary or secondary evidence of the document. The maxim of law is that whatever is in writing must be proved by the writing. Section 91 of the Evidence Act incorporate this principle.

The section emphasizes that when a contract, grant or some other disposition of property is reduced to the form of a document or is required by law to be reduced to a document, no evidence shall be given for the proof of it except

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the primary or secondary evidence of the writing itself. The section extends to both types of transactions, namely, which have voluntarily been made by writing and for which writing is compulsory, for example, transfers of immovable property of the value of Rs. 100 or upwards is required by law to be in writing. Thus writing becomes its own evidence and excludes all other kinds of evidence. The writing excludes oral evidence altogether.

This principle of exclusion applies only to a contract, grant or other disposition of property. A document or deed which cannot be described as a contract, grant or disposition of property shall not be affected by this rule. The Supreme Court held in **Taburi Sahai v. Jhunjhunwala (AIR 1967 SC 1060**), that a deed of the adoption of a child is not a contract within the meaning of Section 91 and, therefore, the fact of adoption can be proved by any evidence apart from the deed.

Exceptions:

1. Appointment of a public officer: Where the appointment of a public officer is required by law to be made by writing and the question is whether an appointment was made if it is shown that a particular person has acted as such officer, that will be sufficient proof of the fact of appointment and the writing by which he was appointed need not be proved.

2. **Wills:** Wills admitted to probate in India may be proved by the probate. The document containing the will need not be produced. "Probate" is a copy of the will certified under the seal of the court and, therefore, is a sufficient proof of the contents of the will.

Exclusion of Evidence of Oral Agreement (Section-92): The principle of the section applies only to such contracts, etc., as are required by law to be reduced to the form of a document. The principle laid down is that when the terms of any such document have been proved by the primary or secondary evidence of the document, no evidence of any oral agreement or statement shall be admitted, as between the parties to the document or their representatives, for the purpose of contradicting, varying, adding to, or subtracting from the terms of the document. In other words, no oral evidence can be given to qualify the terms of the document.

In **Veeraswami v. Narayan (AIR 1949 PC 32)**, it was held that evidence can be given of any oral agreement which does not contradict, vary, add to or subtract from the terms of the document.

Exceptions:

1. **Validity of document:** The first proviso to section 92 says that evidence can be given of any fact which would invalidate the document in question or which would entitle a party to any decree or order relating to the document.

2. **Matters on which document is silent:** Evidence can be given of an oral agreement on a matter on which the document is silent. Such evidence is allowed subject to two conditions; Firstly, the oral agreement should not be inconsistent with the terms stated in the document. The terms which are expressly stated in the document cannot be allowed to be contradicted by any oral agreement. Such evidence is allowed to be proved only on matters on which document is silent. Secondly, in permitting the evidence of oral agreement the court is to have regard of the degree of formality of the document. If the document is extremely formal, evidence of an oral agreement shall not be allowed even on matters on which the document is silent.

3. **Condition precedent:** The third proviso provides that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the document may be proved. If the document was signed and issued subject to a condition, which though not mentioned in the

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document, it was agreed between the parties that the liability under the document would not arise until the condition was fulfilled, such an oral agreement is allowed to be proved.

4. **Rescission or modification:** This proviso permits proof of an oral agreement by which the document in question was either rescinded or modified. To rescind a document means to set aside and to modify means to drop some of its terms. Where after executing a document the parties orally agree to treat it as cancelled or to modify some of its terms, such oral agreement may be proved.

5. **Usages or customs:** The proviso provides that the existence of any usage or custom by which incidents are attached to a particular type of contract can be proved. But this is subject to the condition that the usage or custom of which proof is offered should not be against the express terms of the document. The usage should not be repugnant to or inconsistent with the document, for otherwise, it should nullify the document.

6. **Relation of language to facts**: According to the last proviso any fact may be proved which shows in what manner the language of a document is related to existing facts. Every contract is intended to apply certain facts. The facts upon which the document is to operate are sometimes set out in the contract itself and sometimes not.

Q. Can a Judge or Magistrate be compelled to answer any question as to his own conduct in Court? Express your view on the said point.

No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any question as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations: (a) A, on his trial before the Court of Sessions, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Sessions of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(c) A is accused before the Court of Sessions of attempting to murder a police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Scope: "Sections 121 to 132 provide exception to the general rule that a witness is bound to tell the whole truth and to produce any document in his possession or power relevant to the matter in issue." There are cases in which the witness is a "privileged" with respect to certain matters and he cannot be made bound to answer questions while giving evidence.

Principle: Under this section a judge or a magistrate is a competent witness. A judge or a magistrate cannot be compelled to answer questions except: (i) upon the special order of the court to which he is subordinate or (ii) as to his conduct in court as such judge or magistrate in relation to a case tried by him.

This section makes it clear that privilege granted to the judge or magistrate cannot be extended to the other kinds of witnesses. So long he or she is acting or has acted as a judge or a magistrate no question is permitted to be asked

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as to his or her conduct or judicial function. But the superior court by virtue of the section has right to question as to his or her conduct. The Supreme Court has extended the privilege to arbitrators also. According to the Supreme Court in no case an arbitrator can be summoned to explain how he came at his award.

The privilege given by this section is the privilege of the witness, i.e., the judge or magistrate of whom the question is asked. If he waives such privilege or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege. A session judge while trying a case cannot compel a committing magistrate, except under the special orders of the court to which he is subordinate.

Q. Explain the term 'Lex Fori'.

Lex Fori - is the law of the place where the dispute is being adjudicated by a court.

For eg : Limitation Act is lex fori. example : in a contract entered into between A company of India and X company of England in France. The Substantial Part/The interpretation of the Contract would be governed by the place of contract which is lex loci contractus. However when they sue on contract in India -the questions whether the claim is time barred would be governed by Indian Limitation Law.

Latin term lex fori is also known as the "law of the forum" and it is distinguished from the lex causae which is the law the forum to resolve the particular case. It's play an important role in sovereign powers of any government is to enact laws and to define the extent of their application. These laws will be applied through different institutions.

Some will be formally constituted as courts. Other institutions will exercise specific functions within administrative, religious. The social mobility has increased and the internet encourages people to trade across national boundaries, a need to recognise the relevance and importance of foreign laws to dispute resolution has arisen. Hence, within the precise limits set by the lex fori, local courts may sometimes apply one or more foreign laws as the lex causae if the politics, public policy and it requirements of justice of dictatorship.

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